

# Communication in the Ninth Circuit: A Concern for Collegiality\*

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## I. INTRODUCTION: STRUCTURE AND CONTENT

This article addresses communication among judges in a large appellate court—the U.S. Court of Appeals for the Ninth Circuit. We examine *how* judges communicate with each other in the course of reaching decisions, not the substance of the judges' communication or the court's doctrinal output. That message and medium are related can be seen in potential effects on the internal consistency of the court's doctrine, but the topic of inquiry is not the message but the medium.

### A. *Why Communication?*

Attention to communication in appellate courts is important because it is a key interaction variable in a judicial institution. Attention to courts like the Ninth Circuit is important because we need to have a picture of appellate courts which differ from those—the U.S. Supreme Court and many state tribunals—in which all seven or nine judges have chambers in the same building.<sup>1</sup> Although the judges of those courts do not make frequent use of the opportunity to go down the hall to discuss a jurisprudential point with a colleague,<sup>2</sup> they do meet

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1. For earlier work, see Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 405 (1972), focusing on a district judge, and passing references in M. SCHICK, LEARNED HAND'S COURT (1970), as well as the more recent J. HOWARD JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981). See also the author's previous studies: Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 GOLDEN GATE U.L. REV. 1 (1977) [hereinafter Wasby, *Communication Within the Ninth Circuit*], and *Internal Communication in a U.S. Court of Appeals: The Eighth Circuit*, 58 WASH. U.L.Q. 583 (1980) [hereinafter Wasby, *Internal Communication*].

2. Chief Judge Patricia Wald of the D.C. Circuit, where all the judges are in the same building, says that one's colleagues "are so busy that you don't walk down the hall and start talking . . . about how you are going to word this sentence or elaborate a

as a collective body with some frequency to decide cases and to debate opinions they will issue. By contrast, although from time to time convening as *en banc* courts, the federal appellate courts, whatever their size, decide most cases through rotating three-judge panels, and their judges do not maintain chambers in the same courthouse. Because these courts thus provide an institution potentially quite different from what we might call the "Supreme Court model" of appellate court decision-making, we need to know whether and how differences from that model affect communication within the court.

Communication among judges of a multi-member court, particularly a large one, is of interest not simply because one would prefer that judges break bread together rather than be at each others' throats (or break heads rather than bread). Concern has been expressed that increased caseloads and the increased numbers of judges not only "strain working relationships" but also "threaten the stability and continuity of law."<sup>3</sup> In short, failed communication resulting from larger courts implicates the quality of the court's output. Effective communication among the judges is important not only if three-judge panels are to be able to agree on dispositions and opinions, but is also crucial if inconsistency in the law of the circuit, as different panels take different doctrinal tacks and thus reach conflicting outcomes, is not to be a problem of serious dimension.<sup>4</sup>

### B. *Why Collegiality?*

Communication is at the heart of "the immediate relations judges have with colleagues on the bench."<sup>5</sup> That makes communication important because of its implications for collegiality. Although some use the term "collegial" to mean simply multi-member, for most judges a "collegial" court is not simply

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point." New D.C. Circuit Chief Judge Wald Interviewed, 18 THIRD BRANCH 1, 11 (No. 7, 1986). The same is true at the Supreme Court, about which Justice Powell has remarked that correspondence and memoranda are the principal modes of communication between the justices' offices. See Powell, *What the Justices are Saying* . . . , 62 A.B.A. J. 1454 (1976). See also H. Perry, Jr., *Deciding to Decide in the U.S. Supreme Court: Bargaining, Accommodation, and Roses*, at 9, paper presented to American Political Science Association (August 1987) (because of press of time, "the proper way to communicate among justices is through writing") [hereinafter Perry].

3. M. CANNON & D. O'BRIEN, VIEWS FROM THE BENCH 30 (1985).

4. See Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979) [hereinafter Wasby, *Inconsistency in the United States Courts of Appeals*].

5. C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS & APPROACHES 77 (1974) [hereinafter SHELDON].

synonymous with a multi-member one. First Circuit Judge Frank Coffin has written about the "intimacy, continuity, and dynamism in the relations among judges" in smaller appellate courts and the virtues of the continuing working relations among those colleagues.<sup>6</sup> For the Ninth Circuit's judges, a collegial court is a "cohesive," "friendly," "warm group" of people,<sup>7</sup> one in which the judges have "mutual respect" and "understanding" for each other and maintain friendship across ideological lines. Such a court is something the judges work hard to retain despite difficulties in a court with many judges.<sup>8</sup> Particularly when there is an intracourt dispute as to how to handle some business, judges are quick to express concern about the need for collegiality and to stress the importance of avoiding divisiveness and of putting contested, and controverted, decisions behind them.

### C. *Why the Ninth Circuit?*

A broad understanding of the judicial process in appellate courts is necessary, not only for social scientists and other observers of the judicial system, but also for lawyers because many lawyers and even many of those practicing before appellate courts are not aware of the courts' internal functioning. For a fuller understanding of appellate courts, we need to

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6. F. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 58-59, 171 (1980) [hereinafter COFFIN]. See also Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 *FORDHAM L. REV.* 369, 385 (1984) (collegiality "improves the quality of opinions").

7. Material which appears in quotations without attribution is drawn from interviews with the judges, which were conducted on the basis that comments would not be attributed to judges by name. Although the male pronoun will be avoided where possible, "he" and "his" will be used throughout in order not to treat the four women members of the court separately. Comments from more than one interview may be combined in the same sentence.

8. "The members of the court appreciate the need for collegiality and actively pursue it." U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, *THIRD BIENNIAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF SECTION 6 OF THE OMNIBUS JUDGESHIP ACT OF 1978 AND OTHER MEASURES TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE NINTH CIRCUIT* 10 (1986). A judge from another circuit has recently suggested that there is little in the selection process concerning an individual's ability to work collegially. He also believes it is not likely to develop on the job: you bring it with you, and serving as a trial judge (which he was) may "freeze you as an island." Comments by Judge Joel Flaum, U.S. Court of Appeals for the Seventh Circuit, Roundtable on Interaction and Decision-Making on Appellate Courts, American Political Science Association, Chicago (September 3, 1987). Another panelist suggested that presidents' recent emphasis on the appointment of judges to carry out policy positions may serve to break down collegiality. Remarks of Professor David O'Brien, University of Virginia.



learn both about commonalties among courts and about their idiosyncrasies. As to the latter, Cooper has observed, "One or more circuits within the system of federal circuit courts of appeals are sufficiently unlike other system subunits so that individual organizational analysis is needed in order to understand their operations along with the systemwide perspective."<sup>9</sup>

As the largest federal appeals court in terms of geography, number of judges, and caseload, the Ninth Circuit is both a representative and unrepresentative appellate court. It is representative in its operating procedures, and many of the basic patterns of communication described in this article will be found in other circuits.<sup>10</sup> However, it is, to use Cooper's words, "sufficiently unlike" other U.S. courts of appeals to warrant a study focusing on it alone. Its wide geographic domain, heavy caseload, and large number of judges of differing ideological views are characteristics thought by many to work against effective internal communication and especially against collegiality. If we treat the effects of these elements as problematic, even while hypothesizing that they are likely to have some effect, the Ninth Circuit becomes a useful research site for the study of communication among appellate judges.

The Ninth Circuit is also worthy of attention because of the pressure, now more than a decade old and stimulated by former Chief Justice Burger, to split the circuit. The 1978 Omnibus Judgeship Act made available to the court the option of dividing into two circuits. This option was exercised by the Fifth Circuit but was resisted by the Ninth Circuit's judges. The Ninth Circuit remains intact and external pressure to split the circuit has diminished. An additional reason for studying the Ninth Circuit is the high rate of reversal of its decisions by the Supreme Court, particularly in the October 1983 Term; however, it is unclear whether the high court paid particular attention to Ninth Circuit opinions in choosing cases for review,<sup>11</sup> and the rate at which Ninth Circuit rulings have been affirmed has declined since the 1983 Term.

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9. Cooper, *Courts as Discrete Organizations and System Components: The Case of the D.C. Circuit Court of Appeals*, in *THE ANALYSIS OF JUDICIAL REFORM* 205 (P. Dubois ed. 1982).

10. See Wasby, *Internal Communication*, *supra* note 1, at 583.

11. See Uelmen, *The Influence of the Solicitor General Upon Supreme Court Disposition of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record*, 69 JUDICATURE 360 (1986).

One might at first be tempted to say that, given its characteristics, the Ninth Circuit could not be collegial and perhaps could not even function effectively. Yet we must be careful not to *assume* that any of the court's characteristics would necessarily and automatically affect communication negatively. For example, judges of differing ideological persuasions, a result of appointments to the Ninth Circuit by Presidents Carter and Reagan,<sup>12</sup> might expend effort on being collegial so that differences that affect decisions would not result in an unhappy, fractionated court of the type exemplified by the D.C. Circuit during the tenure of Judges David Bazelon and Warren Burger.

The same is true as to the number of judges. Some have suggested that any court of more than nine judges, in the conventional wisdom the upper limit for court size, cannot even *function*. Yet there are almost twice as many active-duty judges in the Ninth Circuit (28) as in the next largest federal appellate court, the new Fifth Circuit (16), giving rise to concerns that a court of 28 active-duty judges plus several senior circuit judges cannot remain collegial in any meaningful sense of the word.<sup>13</sup> When the Ninth Circuit had only 13 judgeships but more were anticipated, the comment was heard that a court of 23 judges, much less one of 28, "won't be a court; that's a commission." However, one judge said that although the country had "never had a court of 28 judges, I'm morally certain there is no problem at all [with a court of that size] unless we create one." If, as is done by many people, nine judges are posited as the ideal number, one assumes a problem with any larger number; in such a situation, "you don't have to bother with the facts." One can form a "cohesive, cooperative unit" with the same number of people one would have in a fraternity or sorority, much fewer than one would have in a business, although fraternity and sorority members usually live in one house or at least reside on the same campus.

The Ninth Circuit's judges have diverse backgrounds. The

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12. Carter appointed 15 judges and Reagan, by the time of this study in mid-1986, appointed 7 of the court's 28 judges.

13. "There was also a concern that a court of this size could not maintain the collegial spirit considered essential to the functioning of an appellate court." U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SECOND BIENNIAL REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 6 OF THE OMNIBUS JUDGESHIP ACT OF 1978 AND OTHER MEASURES TO IMPROVE THE ADMINISTRATION OF JUSTICE WITHIN THE NINTH CIRCUIT 2 (1984) [hereinafter SECOND BIENNIAL REPORT].

chief judge, a former government antitrust lawyer, was Clerk of the U.S. Supreme Court. His colleagues include eight former federal district judges, a judge of a federal specialized court, and several former state intermediate appellate court judges, as well as a few judges from state courts of last resort. Several judges have also had state trial court experience, and some bring experience from more than one court. There is a former member of Congress and people who had been quite active in state politics; two judges held high Justice Department positions. Four former law professors (including two deans) are now members of the court. Those who came to the court from private practice came from very small to quite large firms; their practice was general, leaning to corporate and commercial work but including labor law. That so many were federal or state judges made it relatively easy to integrate them into the court's work. Although those with prior judicial experience thought becoming assimilated into the court was more difficult for their colleagues who lacked such experience, some of the latter disagree; they find their lawyering and teaching experience quite appropriate background and the transition not difficult. This is particularly true as a result of the court's orientation programs for the judges to learn about the ways in which its units (the clerk's office, staff attorneys, and circuit executive) function, and its assigning judges to calendars of less than a full week for their first several months on the court.

The geographic area covered by the Ninth Circuit is huge—the entire Far West and then some.<sup>14</sup> More important is that, like judges in all other federal appeals courts except the D.C. Circuit and the specialized Federal Circuit, the Ninth Circuit's judges do not live in one location and are not stationed in one courthouse.<sup>15</sup> Even with the increase in judgeships to 28, only five active-duty judges, including the chief judge, and two

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14. California, Arizona, Nevada, Idaho, Montana, Oregon, Washington, Alaska, Hawaii, Guam, and the Northern Marianas.

15. Several years ago, all the Seventh Circuit's judges lived in one city, a result not of a court rule but of the "moral suasion" of the then chief judge. When a newly-appointed judge decided not to move to Chicago, that pattern was broken. The Seventh Circuit judges had spoken out in favor of their arrangement. See Swygert, *Bench and Bar Work Together in the Seventh Circuit*, 61 A.B.A. J. 613 (1975) [hereinafter Swygert]. We should also note that the judges of state high courts do not always live in the same city, so they too may come together only for oral argument and other court business, remaining in dispersed chambers much of the time.

senior judges were stationed in San Francisco.<sup>16</sup> In mid-1986, the nine active-duty judges in the Los Angeles area were in several locations. Five judges were in the old federal courthouse in downtown Los Angeles and one in Santa Ana. Only three judges, one of whom was there only part of the year, plus a senior judge, were in the new Pasadena courthouse, although they were soon to be joined by a judge who moved from Washington, D.C.<sup>17</sup> Other judges were scattered from Seattle (three active-duty judges and two senior judges), Portland (one active-duty judge and a senior judge), and Boise (one judge) in the north, through Reno (two judges) and Sacramento (one judge) to Phoenix (three judges), Tucson (a senior judge), and San Diego (two judges) in the south. There is a senior judge, but no active-duty judge, in Hawaii, Montana's representation is the chief judge, and the judge from Alaska spends half the year in California.

The Ninth Circuit is different from most other circuits in hearing argument at more than one place, and in more than one city simultaneously. Where the Second Circuit sits only in New York City, the Fifth in New Orleans, and the Sixth in Cincinnati, panels of the Ninth Circuit sit at San Francisco, Pasadena, Seattle, Portland, Honolulu, and Juneau, and can also sit at San Diego and Phoenix. The principal sittings are at Pasadena and San Francisco, in consecutive weeks each month, while the regular Seattle and less frequent Portland sittings occur during the same week as the Pasadena calendars.

The simultaneity of Pasadena, Seattle, and Portland sittings may mean that judges coming to Pasadena for argument may find some resident judges away on court business, thus limiting the opportunity for interaction. However, judges coming to San Francisco for argument are likely to find its resident judges in their chambers even if they are to sit elsewhere that month. Were all argument held in one city, as in most circuits, nonresident judges would have somewhat more opportunity to

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16. One of the active-duty San Francisco judges has since moved to Reno, reducing the number of active-duty judges at circuit headquarters, and when another took senior status it was not clear the person nominated as his replacement would establish his chambers there. The next chief judge does not plan to move to San Francisco; in other circuits, it is not unusual for the chief judge not to be located at circuit headquarters.

17. The five at the Spring Street courthouse downtown include one judge awaiting completion of chambers in Pasadena, plus "the Los Angeles Four," who have resolutely declined to move to official stations in Pasadena, although they must commute there from time to time for argument.

interact with the resident judges, although interaction can also be reduced in that situation if a judge who is "off calendar" that month does not bother to come to the site of argument.

To increase interaction among the appellate judges, for several years all panels sitting in October have sat in San Francisco; what would have been the Pasadena, Portland, and Seattle panels are transferred there. Only those judges who are off-calendar that month do not come for the entire week, and they come for the court meeting, which is the judges meeting to handle the appellate court's administrative business.<sup>18</sup> The judges originally called this week "collegiality week"; however, the court's staff, which has to prepare for two weeks' worth of work (the combined sittings) in one week, began to call it "Octoberfest," and that name has stuck.

Over 5,000 cases are submitted to the court each year, up from 3,000 per year in 1979.<sup>19</sup> Many judges consider this caseload, which accounts for 20 percent of the federal appeals, "burdensome" and "unrelenting," and one has said that "the workload has caused him to spend less time actually thinking and writing about individual cases."<sup>20</sup> To process that caseload effectively, the Ninth Circuit has adopted procedural innovations collectively referred to as the Innovations Project. The Project includes changes in the court's administrative structure, an increase in the size of the oral argument calendar coupled with less use of district judges as panel members, a submission-without-argument (or screening) program, and a prebriefing conference program.

At least some of these matters have implications for communication within the court<sup>21</sup> and other innovations are worthy of attention as they affect the ability of an appellate court with a large number of judges to function effectively. An example is the reduction in the court's use of district judges

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18. In addition, the law clerk orientation session for the year is held at the beginning of that week, and all clerks and judges go to lunch together on one day.

19. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 1984 ANNUAL REPORT OF THE NINTH CIRCUIT 8 (1984) [hereinafter 1984 ANNUAL REPORT].

20. Judge Joseph Sneed, *quoted in* Overend, *Mavericks in Black Robes—West Is Their Bailiwick*, Los Angeles Times, Dec. 24, 1984, at 3 [hereinafter Overend].

21. See J. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985) [hereinafter CECIL]. Cecil's emphasis was primarily a management one, with particular attention to the effects of innovations on the court's dispositions and judges' participations in those dispositions, not on communication among the judges, although he does touch on that subject in examining some of the innovations.

from the extremely high levels of previous years when the Ninth Circuit Court of Appeals made greater use of judges other than its own than did any other court in the nation.<sup>22</sup> The increase in appellate judges as a result of the 1978 Judgeship Act and the appellate judges' decision to increase their productivity allowed decreased use of district judges. Thus in 1984, the court was able to report a "50 percent reduction" in the number of district judges "visiting" the court, which is said to have helped in "stabilizing the development of law within the Circuit, fostering collegiality among the circuit judges, and contributing to a more efficient work pattern."<sup>23</sup>

The Innovations Project is part of the effort by the Ninth Circuit, under the leadership of its chief judge, to try to demonstrate that a large circuit can function effectively. In defending retaining the circuit in its current form as "an institution that has a capacity for bringing together different parts of the nation," Chief Judge James Browning has argued that the Ninth Circuit, by increasing its productivity and keeping up with its caseload, has shown it has that capacity. The Ninth Circuit, "one of the last national courts," thus can serve as "a model for the future" of federal appellate court structure. To be such a model, it must work effectively and thus, through procedural innovations, has to do something about its backlog. The alternative would have "endless division" of circuits as they reach a certain number of judges or size of caseload,<sup>24</sup> leading to greater need for a National Court of Appeals or Intercircuit Tribunal as intercircuit conflicts requiring resolution by a national court multiplied.

One last reason for studying the Ninth Circuit is that it has been studied before,<sup>25</sup> providing the possibility of examining change. The present study is one of relatively few in which the focal court was reexamined to see what changes had occurred.<sup>26</sup> It allows us at least to see differences between the

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22. In 1970, a district judge sat on almost half the circuit's panels, with the proportion rising to roughly two-thirds by mid-decade. Wasby, *'Extra' Judges in a Federal Appellate Court: The Ninth Circuit*, 15 LAW & SOC'Y REV. 369, 372 (1980-1981).

23. 1984 ANNUAL REPORT, *supra* note 19, at 12. In 1986, a judge commented that district judge participation had decreased from 70 percent of the panels to 30 percent. The court will have nine senior judges visiting from other circuits per year, but they will occupy positions previously filled by district judges, thus not increasing the number of judges sitting by designation.

24. Overend, *supra* note 20, at 3.

25. See Wasby, *Communication in the Ninth Circuit*, *supra* note 1.

26. See the studies of the Civil Appeals Management Program (CAMP) in the

present views of those on the court when it had only 13 active-duty judges and those who joined it as it expanded first to 23 and then to 28 judges. We might note that the latter expansion made relatively little difference in the court's internal social dynamics, which had already been greatly affected by the initial substantial increase in numbers of judges. Although judges remarked on the process by which changes were adopted and implemented, this study is not longitudinal in the sense of being a continuous look at the process of change in the court, with reexamination every two or three years. Despite the absence of such continuous attention, reexamination after a period of time can give us a more complete picture of change than would have been obtained had the court been examined for the first time in 1986 after its growth to its present size. The latter study would likely have masked significant developments, such as the shift from telephone use to use of electronic mail, which, since the mid-1980's, has been an alternative to the telephone (fast, but no written record) and Postal Service (written record but slow).<sup>27</sup>

#### D. *The Study*

This study was carried out through structured interviews, lasting from thirty minutes to two hours, of the Ninth Circuit's judges and some of its staff, from late March through late June 1986. Because the interviews took place over several months, responses may have been affected by judges' having discussed interview topics at court meetings and particularly at the court's May 1986 Symposium.<sup>28</sup> The interview protocol, composed primarily of open-ended questions, was constructed from the one used in the author's 1977 study of Ninth Circuit communication patterns. Not all questions were asked of all judges, in part because some questions were not applicable to the newest appointees. Twenty-seven of the court's 28 active-

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Second Circuit for one of the few other instances: J. GOLDMAN, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION (1977); J. GOLDMAN, INEFFECTIVE JUSTICE: EVALUATING THE PREAPPEAL CONFERENCE (1980); and A. PARTRIDGE & A. LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (1983).

27. See Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 SANTA CLARA L. REV. 1 (1988) [hereinafter Wasby, *Technology and Communication*].

28. This would have been more likely for the five judges interviewed after the Symposium and for some other judges communicating with each other as they prepared materials for it.

duty appellate judges were interviewed, as were two of the court's senior judges; eight had been interviewed as appellate judges and two more as district judges in 1977. An effort was made to tap the perspective of judges who had seen changes in the court.<sup>29</sup>

Our primary concern is judges' communication in the course of deciding cases. Although there may be some informal discussion of cases when judges are together at lunch, it is not likely to be about specific pending cases because all three members of the panel are unlikely to be present and, if others also are present, the panel would not particularly want to share its discussion. Communication among judges in such situations is, however, important because it helps them to learn about each other; it creates knowledge facilitating the judges' case-directed communication. So does the "incidental casual socializing" that occurs during judges' work on "the business of administering the circuit and the judiciary," including service on committees, exchanges that occur in "social settings adjunct to business," such as the court's annual Symposium and the circuit judicial conference, and the very limited additional socializing that goes on among some members of the court apart from court business. In some instances, social interchange is likely to stem from the judges knowing each other prior to joining the court but also derives from their other court-related activities.

This article is also restricted to judges' communication within the circuit. The judges do not lack contacts with judges outside the circuit, but on average, the judges appear to have less out-of-circuit contact than a decade ago. Practically no Ninth Circuit appellate judges sit elsewhere, although one senior judge recently sat in five other circuits and a newly-appointed judge sat with the D.C. Circuit while still residing in Washington, D.C. Very few if any judges from outside the circuit have sat with the court in recent years. However, starting in 1987, the Ninth Circuit invited senior court of appeals judges from other circuits to sit with the court; the positions they occupy on panels are some previously filled by district judges.

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29. When a judge interviewed in both years was asked questions identical in the 1977 and 1986 interview protocols, the judge was told his earlier answer and asked specifically about *changes* between the two times. Only one judge raised the issue of whether he might seek consistency with his earlier answers. However, even for this judge, the problem did not appear to arise. Repeat respondents indicated change for at least some questions.



Another reason for reduced out-of-circuit contact, perhaps more important, is that the court's caseload so occupies the judges that they have less time for nationally-oriented activity. However, some are involved in American Bar Association work, various national activities relating to the judiciary, and particularly committees of the Judicial Conference of the United States have kept up that activity.

In 1977, almost all the judges with such out-of-circuit contacts found them helpful. In 1986, in addition to the positive comments that one learned of new procedures to apply in the Ninth Circuit and of bad ones to avoid, that one gained broadened perspective, and that one met stimulating people, some judges spoke of the negative effects on Ninth Circuit decision-making of a judge's time expended on such outside activities, however worthwhile. It is "a drain on my time available to do my work here," said one judge, and another judge observed, "My wife and blood pressure suffer with no compensating gain in production."

The remainder of this article will be structured as follows: After a discussion of the court's basic organization, the general stages of consideration of a case will be briefly described. Then attention will be focused on communication between the judges about cases. Cases before screening panels will be discussed first. Then cases set for argument before three-judge panels will be examined beginning with pre-argument communication, extending through exchanges at argument, the post-argument conference, and the post-conference period. This will be followed by discussion of communication leading to the call for an en banc court.

Communication among judges chosen for an en banc court will be considered next along with intracircuit inconsistency, often discussed in the post-disposition/pre-en banc period and a principal reason for the court's going en banc. Judges' communication with district judges with whom they sit will be noted, and judges' communication with each other through law clerks and staff attorneys will also be discussed. The article will end with an examination of some factors thought to have possible effects on intracircuit communication—norms of behavior, the number of judges on the court, its geographic size, judges' locations throughout the circuit—and with the judges' views as to their satisfaction with intracourt communication.

## II. THE COURT'S ORGANIZATIONAL STRUCTURE

The Ninth Circuit, "not different from any other institution," has "got to set policy and have a decision-making mechanism; that judging is our business doesn't change the problem of governance." The court, "like any institution, spends a disproportionate amount of time" communicating in connection with the operation of its various policy-making and administrative units. "Some [communication] is pretty strictly administration, some is education, and some," one judge observed, "is considered essential but verges on monkey business."

Of the several special annual meetings involving the Ninth Circuit's appellate judges, the longest standing is the circuit judicial conference, where the judges—and spouses—are joined by district judges, bankruptcy judges, U.S. attorneys, law school deans, and lawyer representatives from throughout the circuit for a series of speeches, panel presentations, business meetings, and social events. The appellate judges also hold a Symposium to discuss a variety of topics involving the court's present and future functioning apart from the regular process of deciding cases. In the last few years, a midwinter meeting for both circuit and district judges (and, like the others, spouses) has been held on a focused topic. All three of these special meetings combine efforts to deal with important matters and to retain collegiality in the court, with the latter at least as important as the former.

Until 1980, the circuit judicial council was a meeting of the Ninth Circuit's appellate judges wearing their administrative hats. The council considered both "court business," affecting only the appellate court, and "council business," affecting judicial business throughout the circuit, whether in the district or appeals court; court meetings and council meetings "were one and the same." However, in 1980, Congress, in passing a law reaffirming the councils' role in judicial discipline and establishing procedures for handling complaints about judicial misconduct, restructured the councils to add district judges to their membership. With each circuit allowed, within limits, to establish its own mix of circuit and district judges, the Ninth Circuit decided to have a nine-member body (the chief judge of the circuit, four circuit judges, and four district judges).<sup>30</sup>

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30. The four circuit judges are "the most senior member of the Executive Committee of the Court of Appeals . . . and the second most senior active circuit judge in each of three administrative units." U.S. COURT OF APPEALS FOR THE NINTH

Apart from its complaint-handling role, the council, also working through a number of committees on which non-council members sit, now "deals with administration of the whole circuit." The few Ninth Circuit judges who sit on the council have more contact with each other from that work and more contact with the district judges serving on the council, but among all Ninth Circuit judges there is "much less communication on administrative details affecting the administration of the court system." This is, however, not perceived to be a problem. One judge, who said "certain subjects are no longer discussed," noted, "At first I thought I would feel left out" but "now I'm glad I don't know what they are doing."

The restructuring of the council also means that council meetings and the court meetings in which Ninth Circuit judges deal with appellate court business are now "bifurcated." Far more significant, some judges say, was creation of the Executive Committee of the court (not of the circuit), which consists of the chief judge, the administrative chief judges of the court's three administrative units, and other active judges chosen by lot from those willing to serve. Three were chosen at first, then more were added as a result of a request that the group be expanded somewhat. The Executive Committee was to act on "matters that, in the unanimous opinion of the Executive Committee, are of insufficient importance to require action by the full Court." To that charge soon was added authority to "review and make recommendations on other proposals regarding the operation of the Court prior to their submission to the Court."<sup>31</sup> All members of the court receive Executive Committee agendas and reports on its actions.

The court reported to Congress that the Executive Committee, which meets monthly, had "been able to relieve much of the administrative burden on the Court as a whole by coordinating administrative projects, taking routine and emergency action between Court meetings, reviewing staff papers on Court operations, and leaving for Court meetings only those matters requiring consideration by the full Court."<sup>32</sup> The

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CIRCUIT, REPORT TO CONGRESS ON THE NINTH CIRCUIT'S IMPLEMENTATION OF SECTION 6 OF THE OMNIBUS JUDGESHIP ACT OF 1978 AND OTHER MEASURES TO IMPROVE THE ADMINISTRATION OF JUSTICE WITHIN THE NINTH CIRCUIT 48-49 (1982) [hereinafter REPORT TO CONGRESS]. The Ninth Circuit is alone in having a senior judge, a magistrate, and a bankruptcy judge as non-voting participating council observers.

31. *Id.* at 59.

32. *Id.* at 60.

judges appear to feel the Executive Committee functioned well, operated effectively, and became a "more professional, efficient way of doing things, a more orderly way to do business" in a large court, whereas "as a small court, we would individually have to be more involved in administrative detail." It thus was a reflection of the fact that the "court will do less in-depth studying, more delegating out, and hold fewer meetings." "We have confidence in the way the Executive Committee operates," in part because it is "sensitive to not stepping into areas where judges would like to decide." As to those matters, the Executive Committee only makes recommendations to the other judges.

Because of the Executive Committee, court meetings are now held only every other month. Given some judges' obvious lack of enthusiasm over such sessions, this is a distinct plus. "There isn't the time to communicate and discuss there should be, several judges monopolize discussion, and we don't reach consensus." Moreover, "We used to think we should have court meetings more often—then realized we were discussing administrative matters which we don't like to discuss."<sup>33</sup>

The court's administrative units are another element of its structure. Instead of seeking to have the circuit divided, the Ninth Circuit took the statutory option, made available to courts of more than 15 judges, of creating administrative units.<sup>34</sup> A two-stage Administrative Units Plan was adopted, but implementation has been slow. The court was "not fully into the first phase," and it is unclear when fuller implementation would occur. Proposals to decentralize the circuit executive's and staff attorneys' offices draw the most resistance; it is said decentralizing the latter would lose the benefit of its internal specialization and would produce the highly undesirable result of different motions practice in different parts of the circuit. Moreover, technology makes it unnecessary to decentralize the court. The availability of a central computer and the ability to record on it cases filed in Los Angeles and Seattle makes it less necessary to have staff components at each of the

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33. An important reason judges take senior status when eligible is to avoid the court's administrative work. This was certainly a reason when all circuit judges were the council, and remains a reason even after the restructuring.

34. Pub. L. No. 95-486, § 6, 92 Stat. 1633 (1978). The Ninth Circuit is also alone in having availed itself of the option, available in the statute, of having a so-called "short" en banc. See *infra* text accompanying notes 76-78.

administrative unit headquarters. "If you can handle so much on a computer, you don't need to decentralize."

Administrative chief judges—the most senior active judges in each unit—have been designated for the three units (Northern, Central, Southern). They have been delegated some duties within the units. These duties include looking into complaints against judges, participating in committees such as those to choose bankruptcy judges, "appearing at ceremonies for induction of new judges" (sometimes called district judge "coronations"), making contacts with the bar, responding to requests for speeches, and trying to solve space and logistical support problems for district judges—"administrative detail" or what another judge described as "administrative make-work." The administrative chief judges had not been given "any administrative responsibility of any consequence," said one judge. Another said, however, that the administrative style of the incumbents, none of whom were "activist administrators," explained why little had occurred. The first chief administrative judge in the Southern Unit had held regular meetings of the judges in the unit,<sup>35</sup> but those no longer occur.

Creation of the administrative units and the chief administrative judgeships was said to lead to "reduced administrative roles for the other judges of the court and more time for attending to adjudication,"<sup>36</sup> although the judges' general reaction is that the administrative units have had little effect on communication "or on anything else." However, not all are as forceful as the judge who called the administrative units system "a sham, meaningless, cosmetic," something "thought a somewhat magical way to deal with a large circuit."<sup>37</sup>

### III. CASE PROCESSING: A PRELIMINARY SKETCH

After judges receive the briefs in a case on an argument calendar, communication between judges' chambers commences, with discussion as to the cases on which bench memoranda should be prepared and as to which judge's chambers should prepare them. Bench memos are circulated roughly one week prior to argument. Once judges and clerks examine the

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35. REPORT TO CONGRESS, *supra* note 30, at 60.

36. CECIL, *supra* note 21, at 11.

37. Only one judge *without* administrative duties, joined by two other judges, said it affected even communication; of five judges with present or past administrative duties, three said there were no effects on communication.

briefs, there may be communication about whether counsel should be asked to brief recent cases or to be prepared to address specific issues at argument. Other pre-argument communication focuses primarily on "mechanical" or "procedural" matters such as whether the judges should dispense with argument or grant continuances.

Prior to holding court, the judges may meet briefly to discuss whether to ask certain questions, but such meetings are not routine. Immediately after each day's session, the judges hold a bench conference to discuss the cases, assign opinion-writing duties, and decide whether to issue a published opinion or an unpublished memorandum ("memo dispo").<sup>38</sup> This is the *only* time in all but a very few cases when the three panel members meet face-to-face to discuss the case.

Once the judges return to chambers, the next communication is circulation of a draft opinion by the writing judge, which prompts concurrences or suggestions for changes directed both to the opinion's thrust and specifics, including minor citation, spelling, and grammatical errors the judges call "nits." After redrafting and recirculation, the opinion is agreed upon and filed. Communication with judges not on the panel may have occurred prior to the case's resolution, primarily as to whether another panel has a case with the same issue, but communication concerning the case is more likely to expand beyond the panel's three judges once the opinion is filed. Other judges make suggestions or inquire about precedents missed or interpreted in ways found unsatisfactory. If the panel's response, including any modification of the opinion, does not satisfy other judges and they are sufficiently concerned, they may initiate a call for an en banc court. After a formal en banc request, communication among all members of the court takes place within a fixed time after which the judges vote. Communication among all the court's members is most extensive in the period after a three-judge panel's opinion is filed and, particularly, after an en banc call.

If the court votes for an en banc, a "limited en banc"—one of less than all the court's members—is constituted by drawing the names of ten judges who join the chief judge as the en

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38. Not-for-publication dispositions can be redesignated for publication at a later date, on suggestion of the attorneys to the case, the court's staff attorneys, or other judges.

banc.<sup>39</sup> En banc panels function much like three-judge panels. The post-argument conference may last several hours; the chief judge or the most senior judge in the majority assigns the majority opinion and preparation of a dissent is assigned by the dissenters' most senior member. Subsequent communication usually awaits circulation of an opinion, which is usually sent to both majority and minority judges. Communication about the case is, with rare exceptions, contained within the eleven-judge panel, but other members of the court may comment after the opinion is filed.

#### IV. SCREENING: NON-ARGUMENT CASES

Communication by judges on regular argument panels about cases ordered submitted on the briefs does not differ from that for argued cases because the judges can discuss the unargued cases face-to-face. However, communication is likely to be different, both in (decreased) volume and in patterns when special mechanisms are used to decide the simple or "slam-dunk" cases where Ninth Circuit or Supreme Court precedent clearly dictates the result.

Circuits that hear all cases in one courthouse "have no difficulty in leaving the determination regarding argument to the regular panel."<sup>40</sup> Likewise, where "all of the judges have chambers in the same building," panels "can meet informally at a convenient time, or several times if necessary, to consider both argued and non-argued cases."<sup>41</sup> With neither condition present, as in the Ninth Circuit, the court may establish separate screening panels for certain cases—a distinct step beyond judges' reluctant agreement that oral argument should not or could not be heard in all cases. Such a program is quite likely to be important in providing economies "not only in travel time but also judge time and staff work"—time needed for other work—and is also quite likely to make the communication process for such cases different. As Flanders and Goldman reported about an early screening program in the Fourth Circuit:

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39. A judge whose name is not drawn for three consecutive en banc panels is automatically placed on the next panel.

40. J. CECIL & D. STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* 5 (1985) [hereinafter CECIL & STIENSTRA].

41. *Id.*

A result of this screening mechanism is that it is infrequent for the panel to confer in conference on unargued cases. This absence of face-to-face confrontation may modify the traditional view of appellate courts as collegial bodies. The only collegial feature of cases decided without oral argument can be found in the communication network linking judges to each other, and linking judges and their law clerks with central staff.<sup>42</sup>

The Ninth Circuit is now one of eight courts in which court staff identify cases and special panels decide them, and one of six in which staff attorneys have exclusive screening responsibility.<sup>43</sup> The Ninth Circuit had made some stabs at screening prior to its present screening and prebriefing conference programs, adopted at roughly the same time, and had also at least temporarily adopted other special means of case disposition, such as special "crash" panels and a no-brief appeals program,<sup>44</sup> but its recent use of case screening is its "most notable and controversial departure from the past."<sup>45</sup> A couple of judges find screening of cases a "necessary evil" at best and a couple of others' support extends no further than to say it is necessary, but the Ninth Circuit's judges have moved toward approval of the program. In 1984, despite some initial opposition, "all of the judges agreed that the Screening Program is an appropriate means of increasing court productivity without reducing the quality of judicial consideration."<sup>46</sup>

In the present screening program, staff attorneys identify eligible cases for three-judge screening panels. Both civil and criminal cases are included, although one judge expressed some concern that the system was not being used with sufficient frequency in business cases and was used too often in immigration and Social Security cases.<sup>47</sup> Chosen by random

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42. Flanders & Goldman, *Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit*, 1 JUST. SYS. J. 1, 11 (No. 2, 1975).

43. CECIL & STIENSTRA, *supra* note 40.

44. J. SHAPARD, *APPEALS WITHOUT BRIEFS: EVALUATION OF AN APPEALS EXPEDITING PROGRAM IN THE NINTH CIRCUIT* (1984).

45. CECIL, *supra* note 21, at 46.

46. *Id.* at 68.

47. In 1984, roughly one-third of the judges (8 of the then 23) felt "personal rights" cases should not be on the screening track, with immigration cases cited most frequently and "criminal appeals, civil rights cases, habeas corpus cases, and Social Security disability appeals . . . also mentioned." The judges also "questioned whether the resources of the court should be structured so that cases involving 'personal rights' receive less than the full range of appellate services while oral argument is reserved



selection, the panels remain intact for a year, giving the judges an opportunity to become accustomed to each other's decision-making processes and criteria. Any member of the panel can reject a screening case and send it to a regular argument calendar, where it may be disposed of without argument. If attorneys object to screening treatment, a case will be sent to an argument calendar unless the disposition is unanimous. The Ninth Circuit is one of five circuits in which ten percent or more of the cases originally designated for non-argument are reclassified or rejected, that is, sent to argument calendars, with the reclassification rate "as high as 20 percent."<sup>48</sup>

After both appellant's and appellee's brief are received, staff attorneys, with review by the supervisory staff attorney, make the initial determination of eligibility for screening. This procedure provides "a more uniform approach to the argument-no argument decision than would be possible if each chambers were exposed to only a limited sample" of cases.<sup>49</sup> The court's staff attorneys examine the briefs in cases and assign a weight (1, 3, 3L, 5, 7, 10) to each case on the basis primarily of the complexity of the issues.<sup>50</sup> Cases receiving weights of "1" and "3L" (3, light) in the court's present case-weighting scheme go to the screening panels if they are relatively simple and will not benefit from oral argument. A judge should be able to decide a screening case quickly:

*The bus trip test.* If the judges agree on one thing, it is that screening cases should be simple. Stated practically, a judge should be able to carry all the relevant materials (brief, excerpt, and your bench memorandum) on a bus ride

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for commercial cases." *Id.* at 71-72. For an argument that this occurs in other courts, see Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372 (No. 3, 1981).

48. CECIL & STIENSTRA, *supra* note 40, at 32. From July 1, 1982 to June 30, 1984, 975 cases were sent to screening panels, with 878 cases disposed of during that time; the judges rejected 156 cases. In the year ending March 31, 1985, 468 cases were sent to screening panels, with 387 cases decided or rejected (346 decisions, 41 rejections). SECOND BIENNIAL REPORT, *supra* note 13, at 16; U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 1985 ANNUAL REPORT OF THE NINTH CIRCUIT 12 [hereinafter 1985 ANNUAL REPORT].

49. Neisser, *Riding Herd on the Backlog: The Ninth Circuit's Approach*, 56 CAL. ST. B.J. 96, 102 (1981) [hereinafter Neisser]. When the court is current with regard to its caseload, each case is screened on the appellant's brief only. CECIL & STIENSTRA, *supra* note 40, at 20.

50. The basis for the case weights is set out in documents for staff use. In addition to being used to determine cases for screening panels, the case weights are also used to compose the clusters of cases that will comprise a three-judge panel's calendar.

commute and decide both that the case is suitable for submission without oral argument and what the result should be. If your case does not satisfy the 'bus trip test,' it should probably be placed on the argument track.<sup>51</sup>

The Ninth Circuit has established an upper limit on the number of screening cases based on the number of staff attorneys (and their other duties), with no more than 56 cases going to screening panels each month.<sup>52</sup> However, given judges' discomfort about removing substantial numbers of cases from oral argument, it is likely a *de facto* upper limit would exist in any event. In "a deliberate choice by the court to provide oral argument to as many litigants as possible,"<sup>53</sup> some cases otherwise eligible for screening have been used to complete argument calendars once the court caught up on its backlog so that all cases could be sent to argument calendars promptly after briefing was completed. Some judges also suggest that screening panel members who fall behind in their work send remaining cases—"undigested screenage"—to the argument calendar.

The staff attorneys' office sends judges a bench memorandum, "setting out the facts, issues, or history of the cases,"<sup>54</sup> with a proposed disposition, but is unlikely to have continuing contact with the judges thereafter. However, judges "do call for additional research" and may ask the staff attorney to transform the bench memorandum into a memorandum disposition, the outcome in most screening cases.<sup>55</sup>

The Ninth Circuit uses two basic, equally preferred methods—the serial and parallel methods—for handling Screening Program cases, plus some methods referred to as "hybrids." Cecil noted change from predominant use of the serial method (1982: 6 of 8 panels) to roughly equal use of serial and parallel methods (1984: 4 each), with modified practices.<sup>56</sup> The differences between the basic methods directly affect the communication among the judges. In the serial method, case materials

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51. From Staff Attorney Handbook, *quoted in* CECIL, *supra* note 21, at 54.

52. *See* CECIL & STIENSTRA, *supra* note 40, at 24.

53. SECOND BIENNIAL REPORT, *supra* note 13, at 16; *see also* CECIL, *supra* note 21, at 49.

54. CECIL & STIENSTRA, *supra* note 40, at 25.

55. At least 95 percent of cases decided by the court's screening panels have resulted in unpublished rulings. *See* SECOND BIENNIAL REPORT, *supra* note 13, at 16, and REPORT TO CONGRESS, *supra* note 30, at 32; *see also* CECIL, *supra* note 21, at 61. On the possible effects of the Screening Program on the overall increase in not-for-publication dispositions by the court, *see* CECIL, *supra* note 21, at 65-66.

56. CECIL, *supra* note 21, at 56-57.

are sent to only one judge, each panel member receiving one-third of the cases. The first judge, on finding a case acceptable for screening treatment, prepares a memorandum disposition and sends the materials to the second judge; if the first judge thinks the case is unacceptable for screening treatment, it is rejected without being sent to the other judges. Likewise, if the second judge finds it unacceptable, the third judge does not see it. The third judge may reject the case even when the other two have found it acceptable. In the parallel method, all three judges receive materials simultaneously; they usually confer, and if all agree a case should be retained in the screening process, one judge is assigned to prepare a memorandum disposition.<sup>57</sup> In one hybrid, all the judges get the materials simultaneously as in the parallel system, but a writing judge is designated, as in the serial system. Before they confer, all the judges consider the cases, communicating to the writing judge which cases are appropriate for screening.

In 1984, advocates of the serial method "praised its efficient disposition of a case with one viewing and its flexibility in permitting consideration of the screening cases at any convenient time, rather than structuring consideration around a conference call; it saves time that would be spent coordinating discussion of those cases on which the panel members already agree."<sup>58</sup> In 1986, these views recurred but the absence of opportunity to provide "input by the time the case gets to you" was also seen as a detriment because judges do not consult with each other before a judge drafts the disposition. On the other hand, some feel the parallel method provides an opportunity to determine whether a case should be retained or rejected before any one judge had invested considerable time in it.

Three-fifths of the judges (15 of 25) thought communication in screening cases different from that in argued cases; communication also varies depending on the method used. There is no face-to-face contact in the screening situation, no "equivalent of the conference," "no stimulus of lawyers talking to you and everyone talking at the same time"; the judges are "more likely to send memos on minor matters that would otherwise be left to the conference" in argued cases. There is

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57. For more complete details, see *id.* at 55-56. For a full treatment of the Screening Program, see *id.* at 46-78.

58. *Id.* at 56-57.

also less discussion generally, less communication, "less traffic." You "don't call or discuss." "I don't believe I have ever talked to other judges on screening cases," said one judge.<sup>59</sup>

The nature of the cases, simpler than argued cases, led to decreased communication: "Because the standard is that the case should be clear, there is little need for communication." Several judges likened the lessened communication to simple argument calendar cases. It's "almost like a lightweight case that is argued, with a memo in circulation—what about the nits, some small comment." If the case were sent to a regular panel, "we wouldn't spend much time on them; we would dispose of them quickly with assignment of memo disposition." Thus, there may be "less consultative time" spent on screening cases sent to argument calendars than on other cases.

One judge felt there was insufficient communication among screening panel members to help him resolve a difficult issue. However, if a case required communication because it was not easily decided, it was rejected, and communication did not occur: "If much communication is required, it shouldn't be a screening case, so we should kick it back to the argument panel even if it is not argued." An interesting twist comes from a judge who rejects some cases from screening, even when he would be inclined to affirm the lower court, "simply because I would prefer to talk to other judges or with an attorney," because such communication was "better than arch, stiff memos" and he "wants give-and-take." Many Ninth Circuit judges have "expressed a preference for oral argument, as much for the opportunity to confer about the case as for the benefits of the oral argument itself."<sup>60</sup>

Communication in the serial mode, described by a judge as "three judges working independently," takes place almost entirely by memo, with the judges "checking boxes on the form." As described by one judge, "If you are in serial, you pretty much have to dictate a memo; they don't have the file—you send the memo with the file." A judge writes a disposition and the other two judges respond. There were, however, exceptions to the lack of communication. For example, a conference call occasionally would occur when one judge was thinking of rejecting a case and the judges would discuss

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59. Cecil noted that judges cited "the diminished opportunity for consultation among members of the screening panel." *Id.* at 48.

60. *Id.* at 68.

whether to keep the case on the screening panel, or judges "occasionally have conferred, usually by memoranda, on modifying an initial disposition rather than simply rejecting the case."<sup>61</sup> Communication by memo is also necessary when the first and second judges "have to design a little memo about the case" to deal with the third judge, who, not having the materials, "has never heard of the case," and you "don't want to interrupt with a case they don't know anything about and are blissfully unaware of." Avoidance of writing that necessary memo—not a formal duty but a collegial obligation, and perhaps an indication of a predisposition to communicate—"is a reason to keep the case on the calendar" rather than explain the problem; this is a reality running counter to the general rule that if a case requires communication, it should not be a screening case. Another instance when the need to communicate serves to keep cases on the screening panel occurs when a third judge in a serial panel wants to kick the case off the calendar; that judge would owe his colleagues a memo or there would be a "waste of time" when the "first and second judges work up a case and the third judge rejects."

Communication about problems is facilitated in the parallel method because all get the materials at once and are working on them simultaneously. Although "telephone conferences are antithetical to the [screening] system," they can be at the heart of the parallel method, which is one of the reasons it "promotes collegiality" and attracts some judges. However, the telephone is often displaced by the memorandum, resulting in a situation of "equal telephone and writing" compared to the predominant use of writing in the serial mode. A judge who introduced the principal hybrid method noted above "concluded that the telephone conference was not productive" because the "call could come through before you were ready." Sending a memo, on the other hand, allows other panel members to look at the materials at their convenience. Thus, the telephone conference may be restricted to discussion of cases about which there is doubt; cases on which there is no doubt do not require or prompt such conferences. Such communication as does occur assists the judges in becoming accustomed to each other's views. Although each has an independent "veto" as to retaining a case in the screening program, the collegiality resulting from communication may assist in agreeing on dispo-

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61. *Id.* at 58.

sition of those retained. This is true even though agreement is easier in any event because cases in the screening program are lightweight cases.

## V. ARGUED CASES

### A. *Prior to Argument*

Communication prior to argument is relatively limited, and by and large deals with getting a case ready for argument, with "process"; there is "nothing on substance" or "nothing on the merits—mostly housekeeping." Communication is limited because of the judges' "tradition against discussion in advance of oral argument" and their preference "to go in free of commitment to a result." Perhaps more important, communication is limited because the judges are busy "trying to get rid of the last calendar and get ready for the next."<sup>62</sup> Talking to a judge who is a "crammer," preparing at the last minute for the upcoming calendar, will not be useful.

The judges say the Ninth Circuit is the only federal appellate court "with exhaustive bench memos prepared prior to arguments" and that the court "does more cooperative work about bench memos than other circuits." Because the "tradition is to divide bench memo work," among "housekeeping" matters once briefs are received by the judges' offices is discussion about which offices are to prepare bench memos in which cases, so that duplication will be avoided. Telephone conversations about which cases each office wants will be followed by a memo from the presiding judge indicating assignments. Whether or not judges are involved, exchange of bench memos is "communication of sorts" between the judges' offices. Law clerks, not judges, are responsible for bench memos, which a judge may send to other panel members without reading, noting they had not been reviewed. In some, but not many, instances, bench memos will provoke a counter-memo with a comment or disagreement, but the judges—or their clerks—usually do not have preargument time for such exchanges.

Other communication deals with such matters as requests for continuances, whether judges should eliminate or shorten argument, whether the parties should brief the effect of Ninth Circuit or Supreme Court cases decided after briefs were filed,

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62. There is a parallel in the U.S. Supreme Court. "The prominent explanation for such little pre-conference contact had to do with time." Perry, *supra* note 2, at 10.

or whether, during argument, they should address issues clerks discovered while preparing bench memos. Sending questions to lawyers in advance of argument, while varying with the panel's membership and particularly with the presiding judge, is now "not uncommon."<sup>63</sup> One judge argued for going further by circulating draft dispositions to the other judges and counsel before argument so the lawyer could "point out flaws." Discussion about waiving argument or requiring supplemental briefs may move judges' communication from "housekeeping" to the merits. A judge suggesting dispensing with oral argument may, in some situations, propose a disposition; when judges do dispense with argument, the judge whose office wrote the bench memo will be given the task of preparing a memorandum disposition.

Both the telephone and written memoranda sent by electronic mail are used in pre-argument communication. As noted, communication about dividing bench memos may proceed from telephone conversation to written assignment memo. Where substantive matters are involved, as in briefing of additional points, a memo is most likely, with a judge preparing a form of order and sending it to other panel members for their concurrence. Although use of the phone or electronic mail "depends on the presiding judge," some matters, particularly waiver of argument, are likely to be handled telephonically because of time pressure. Judges are also "more apt to pick up the telephone" to deal with parties' motions because they are "just handling administrative aspects" and do not feel the restraint that otherwise exists to communicate on the merits simultaneously with both panel members.

### *B. Argument and Conference*

Presiding judges of some panels meet their colleagues for a half-hour immediately prior to argument to discuss areas on which to concentrate and questions to ask the lawyers. We tend to think of oral argument primarily as a means of communication from lawyer to judges and judges to lawyers, but it can also be a means of communication among the judges. A judge apparently asking a question to a lawyer may really intend it for another panel member and be "trying to convince

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63. Staff attorneys also might indicate some questions to be asked. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 967 (1980) [hereinafter Hellman].

his colleagues to favor his view.”<sup>64</sup> Oral argument’s manifest function is to bring judges and lawyers together. It also serves to bring together the *judges* on a panel, which is important because the post-argument “bench conference,” when communication among judges “begins in earnest,” is quite likely to be the only time the panel will meet face-to-face *as a panel* to discuss that calendar’s cases.

The Ninth Circuit does not have the Supreme Court’s opportunity to have “the conference” discuss a case again or even several times, facilitated because all the justices are in the same building and do meet regularly. However, absence of the sort of final conference after the writing of the opinion held by the U.S. Supreme Court may not be a particular deficiency because necessary changes will have taken place earlier on the basis of suggestions transmitted to the writing judge, making approval at such a conference likely to be pro forma. Nonetheless, the absence of frequent meetings of the court as a body, whether in a full en banc (which the Ninth Circuit does not hold) or in court meetings, may increase judges’ felt need to communicate in other ways; as they cannot “run up and down the hall” because they are not in the same building, they must resort to telephone and electronic mail.

Because cases are decided from the bench only infrequently, largely a function of the presiding judge’s interest in that method of disposition, the post-argument conference is central in the judges’ decision-making, and it was found the “most revealing” and the “most meaningful” form of communication. It is the “only time you can spontaneously explore your ideas and hear comments from other judges who have done their research.”<sup>65</sup> However, another judge found the conference unsatisfactory and argued that “the process before writing” should be expanded with “a need to go through the cases issue-by-issue.” Informal discussion between judges does occur but is not a substitute because it is likely to be about the law in general or developments within the court, not about pending cases because three members of a panel seldom have offices in the same courthouse.

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64. See Wasby, *Oral Argument in the Ninth Circuit: The View from the Bench and Bar*, 11 GOLDEN GATE U.L. REV. 21 (1981); Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340 (1982); and COFFIN, *supra* note 6, at 110-111.

65. In 1977, several judges rated the post-argument conference the most effective means of communication.



Communication among judges has been affected by changes in composition and duration of panels. Panels previously were shifted or "churned" during a week of argument,<sup>66</sup> and many district judges sat on panels. Panels now are to stay together for a week. However, this may not be possible when a senior judge does not wish to sit for a full week, a new member of the court has a limited calendar, or a judge may have recused from a case close to the time of argument. To increase the court's productivity, the judges agreed to shift from ten four-day argument calendars per year (one week in each of ten months) to five-day calendars in each of nine months,<sup>67</sup> and to accept calendars of heavier weight. Whereas the panels had been assigned cases with a total weight of 16 points, the basic panel calendar is now 18 points, for example, six cases weighted "3" or three cases weighted "5" and one weighted "3." Some judges have preferred to collapse five days' argument into four days; however, this creates a daily calendar with a weight of 21 points or more, producing "tremendous pressure where you can't give sufficient attention to a case." A judge, who said the workload was "brutal, incessant, remorseless," found nine sessions of five days "too much" except as a one- or two-year emergency measure. It "strains our resources" and "gives little if any time for reflection."

More extended sitting with the same set of colleagues gives each judge "some feeling of being able to anticipate a judge's response to a problem"<sup>68</sup> and "allows panel members to interact better during that time." The judges "can get into the rhythm of communication" and "don't have to explain everything all over again." Moreover, "if an idea occurs during the week, you can share it." "Collegiality is best promoted" because "we learn each others' strengths and weaknesses; that makes communication in the future much easier." However, having judges sit together for a whole week "limits the oppor-

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66. "Scrambled" panels are said to have been intended in part "to make logrolling more difficult" and in part to prevent lawyers from learning panel composition because such knowledge was thought to prompt requests for continuances.

67. However, "Although most judges sat five days a month for nine months, some judges sat for fewer months, while several judges continued to sit for ten months but heard cases under the more demanding five-day calendar. One judge continued to sit for four-day calendars, but for eleven months." CECIL, *supra* note 21, at 29.

68. See COFFIN, *supra* note 6, at 181, on "anticipatory collegiality." See also Feinberg, *Unique Customs and Practices of The Second Circuit*, 14 HOFSTRA L. REV. 297, 306-07 (1986) (judges sitting together at oral argument "cannot help but improve the workings of the collegial process").

tunity to sit with every other judge" and "makes it difficult for new judges to become acquainted with other members of the court." This was because it took longer for each member of the court to sit with every member,<sup>69</sup> but this disadvantage was thought to be more than offset by the advantage of getting to know better those judges with whom you did sit.

### *C. After Conference*

After the post-argument conference, the judges "go separate ways and prepare dispositions." Their next communication is likely to be circulation of proposed opinions, followed by other judges' responses, with another round of communication after the disposition is filed and petitions for rehearing are submitted. Face-to-face exchanges occur only very infrequently after bench conference, with the telephone and written memoranda being the primary means of communication.

Written communication predominates for several reasons. The principal one is that all communications are to go to both other panel members. If two judges from a panel meet in one's office or at lunch and discuss a case pending before the panel, they are expected to communicate about their discussions to the third panel member. A disadvantage of the telephone for three-judge panels is that the phone is "bilateral where what we do [on a panel] is trilateral," so a phone call to one panel member has to be repeated to the third. With separate phone calls, one would also be likely to "give one judge one message, another judge another message," even if not doing so consciously, with content from the first discussion being added to one's message in the subsequent conversation. Use of the phone is appropriate in contacting only one judge, for example, where a dissenting judge, before responding to the majority, tells the other two to "get your heads together," but it does not receive as much use as before even in those situations.

Conference calls would seem a likely option, if all three panel members must be included in communication. Although it was said, "You can get reactions and counterreactions" from conference calls, their benefits are not clear to the judges. Perhaps because effective oral communication requires planning—a judge noted that one must arrange in advance, prepare, and

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69. CECIL, *supra* note 21, at 37.

review—there is a general predisposition against argument panels' use of conference calls.

Telephone calls are thought ineffective and inefficient because they interrupt another judge (a point made repeatedly). Moreover, the called judge is not likely to be thinking about the case in which the caller is interested. Written communication is "less intrusive" and allows another judge to deal with a case when it is timely for that judge, without requiring the judge to "drop everything" and "have to try to fit into each other's schedule" as telephonic communication requires. Thus the written memorandum both respects colleagues' "space" and provides a better quality exchange among judges than does the telephone.

There is a norm<sup>70</sup> that a panel member should communicate the same message to both panel colleagues. This norm gives the electronic mail system (or CCI, the particular system used) a distinct advantage over the phone.<sup>71</sup> The CCI now gets high marks even from judges who in 1977 were self-declared "phone freaks"; those who had relied more heavily on the mails are also positive about a system which sends written material much faster than had the Postal Service. In comparative assessments, one judge pointed out that the telephone was "less significant than the CCI because CCI transmission does not interrupt a judge but reaches the judge just as fast as a telephone message." Another said the CCI allows prompt transmission of detailed changes (including "nits") in other judges' opinions. The electronic mail system has experienced an increase in usage relative to other modes of communication. The increase is what one judge calls "an incremental change, not a sea change," although others find the change quite noticeable. The increase has taken place because the judges find it particularly desirable that the system delivers the identical message, quickly, to two other judges of a panel, to ten other members of an en banc panel, or to all 27 associates on the court.

However, there is a possible drawback to electronic mail. The flipside of the ability to send a message promptly may be damage to the court's collegiality. Concern has been expressed that the system's easy availability will lead a judge to send a tart memo—a "zinger" or "ratfink" memo—without pondering

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70. See *infra* text accompanying notes 108-10.

71. See Wasby, *Technology and Communication*, *supra* note 27.

it as the judge could do if a letter with the same contents had to be prepared and could be reviewed before being mailed. The bite of such memos may leave frayed edges and wounds difficult to soothe, particularly with the lack of frequent face-to-face contact to soften those written exchanges.

A related possibility is that use of electronic mail rather than the telephone may produce greater social isolation of the judges because they deal with each other only at the end of a terminal. The judges' lessened knowledge of each other may make it far more difficult for them to communicate informally—or to be *able* to pick up the phone to resolve matters for which a memorandum is inappropriate. The greater ease of communication by memorandum may thus create a momentum and social situation within the institution that reinforces the judges' lack of appreciation of each other's foibles, although such appreciation is crucial to effective communication in a collegial body.

#### *D. Communication Outside the Panel*

A panel considering a case may communicate with other panels. Much of this communication is related to efforts to avoid inconsistency<sup>72</sup> and occurs after staff attorneys make judges aware that another panel already has a case with the same or similar issues. The judges then contact the other panel "to see whether we really have a similar issue." Such exchange about "off-panel" cases does not result in "abstract discussion of issues" or in deliberations of the merits but is generally limited to "status inquiries" to learn when the other panel will be ready to circulate its opinion or to discuss "whether we should defer or can publish simultaneously." At times the other panel's proposed disposition may be requested "so we can be apprised of the direction they are taking." The telephone appears to be used more frequently in such situations than in some others because "we want instant feedback," although one judge distinguished between use of the phone for status inquiries and use of memos if one panel were making a substantive comment to their colleagues on the other panel.<sup>73</sup> The telephone may also be the best means of communication "if you want to say something you'd not wish in print," particu-

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72. See *infra* text accompanying notes 92-98.

73. Of the 11 judges responding, 7 said that there was a difference in the means of communication between "off-panel" cases and regular argument calendar cases.

larly if you know the judge you are calling and you do not want the message to be seen "by numerous clerks and other judges."

A change in rules on filing opinions in cases with similar issues may have affected communication about "off-panel" cases. Previous practice was that the first panel completed its work and established the rule of law, with other panels following that rule. Now the panel designated in court records as the first one with the particular issue is the one to be followed. The change required some panels to hold back even if ready to issue an opinion, delaying them and leaving them "hamstrung" and "dead in the water." This effect produces dissatisfaction if the first panel's opinion then "goes off on a different issue," because the other cases will have been held unnecessarily. The problem has led one judge to suggest modifying the "first panel" rule by imposing a deadline: if the lead panel had not filed its opinion within a certain number of days after submission of a case, the other panels could proceed to file their dispositions.

Once a panel issues an opinion, any member of the court may comment, trying to alter the opinion to bring it in line with other judges' views. Communication among the judges in this period, which can be particularly frequent, is highly significant. A judge learns of the opinion when the judge or law clerk reads the slip opinion or a newspaper story (which leads to sending for a copy of the opinion before the slipsheet appears), or, somewhat later, after lawyers have filed a rehearing petition. If the judge spots a failure to follow Ninth Circuit or Supreme Court precedent, or a possible conflict with another Ninth Circuit case, the judge may call the opinion's author. The telephone may be used as the first stage of communication in these situations. Use of the telephone is thought more likely where the panel's having missed something "would be embarrassing" ("we do that for each other") or where "time is of some essence." An example would be when the calling judge is working on a similar issue and the other panel "decided something contrary to what we're working on" or "we just filed a case and they don't know." However, the calling judge might go further and "ask if certain issues were pressed at argument and in the briefs and if the court concluded those issues were insubstantial."

A judge concerned about a panel's opinion may communi-

cate with judges not on the panel before deciding to contact the panel. The first call might be to a judge with whom the caller had been working or discussing the issue; if that judge could not distinguish the cases, the first judge then would write to the panel. Or a judge who had decided earlier cases with which the present case conflicted might contact panel colleagues before determining that the present panel was "in error" and to see about "bringing them in line." Such communication might also be used to conserve energy; a judge, before "investing resources to research" a point on which he was unsure, might "pick on a colleague who is strong in that area of the law for his reaction."

Inquiries may at first be relatively minor and innocent, at least in tone. However, if the panel knew of the issues and failed to consider them, or if it knew of a prior case and persisted in interpreting it in a way the questioning judge does not prefer, the matter is likely to be pressed with greater vigor, including memos that will contain "questions directed to the panel to have matters clarified" or "a critique for them to consider." One of a criticizing judge's several options is to suggest that the panel "review a paragraph of an opinion and reconsider, delaying the mandate." Such a memo is likely to be "addressed to the panel but the whole court gets it," which leads to comments from other judges, although the initiating judge has the option of restricting communication to the panel. However, there was "a substantial question as to when memos should be sent to all judges or just to the panel," a matter the court considered at its 1986 Symposium.

## VI. THE EN BANC

The post-conference interchange discussed above is the beginning of the process by which the court decides to take a case en banc. Indeed, it is something "short of the Draconian remedy of the en banc" that "meets problems without en banc formality." One of the court's internal documents notes that the "preliminary skirmishing" after the suggestion of a rehearing en banc has been made, which "sometimes results in changes in the panel's opinion, . . . may permit the Court to maintain uniformity in the law of the Circuit without the delays and burdens of an actual en banc hearing."<sup>74</sup>

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74. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, ORIENTATION HANDBOOK 118 (1984) [hereinafter ORIENTATION HANDBOOK].

When judges communicate after the panel has filed its opinion, the possibility of going en banc is not far in the background. Suggestions for change are made with either the explicit statement (a "threat," although few directly call it that) of calling for an en banc vote if proffered changes are not made, or with the implicit understanding that such a call will be made. At a certain point, judges cross a line between communication to the panel and communication aimed toward an en banc call. Then the whole court, although already aware of the communication, is more clearly brought into the picture and into the communication exchange. When that happens is unclear, and communications of both types may take place at the same time. At times, it happens quickly, when a judge who sees a panel opinion with a dissent calls the dissenter "to see if he is asking for an en banc." At other times, there may be several stages to the process as described above.

When communication clearly turns toward a possible en banc, constraints imposed by the court's rules for an en banc procedure become operative. For example, as one judge noted, "If the mandate issues, I must then act formally with a call for an en banc," which must be made within a certain time unless the clock is stopped, allowing more time before an en banc call is made. A full exchange of memos takes place for 14 days from the en banc call.<sup>75</sup> "Usually only five or six judges are active" in the process, although there can be "an exception when all send many memos." Usually the panel opinion's author and one other judge are the "principal writers"; they are joined by a "handful of sub-writers." Judges vary in their proclivities: some "write long memos and answer every memo to them," while others "are more circumspect as to the number of memos and number of pages." Electronic mail is used almost exclusively in this process, which produces a "blizzard" of memoranda, because all the court's members must receive all communications. However, at times duplication of effort is reduced through telephone calls among judges asking, "Are you going to write a memo?" or "What do you think?" Such use of the telephone is also increased "because of time pressure."

Some judges complain that too much papers flies during

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75. Senior circuit judges may elect to have their names placed in the "draw" for an en banc panel if they have participated in the panel whose opinion is being reviewed, but they do not participate in the decision to have an en banc.

this period, but others strongly support the communication, one even calling it "the major source of any sense of community within the court" and another calling it "the high point of judging." If the "substantial resources" of an en banc sitting are to be allocated to a case, there "*should* be a vigorous exchange" of views, in which judges are "advocates trying to persuade." Lobbying at this time, when all are privy to the communications—unlike one-on-one lobbying, on which the judges frown—is a "healthy conflict in an exchange of views," which forces a rethinking of views. This rethinking is imperative if the en banc is to be effective, for an unclear en banc is thought worse than an unclear panel opinion. "If you are going en banc, the cost of a mistake in rationale is much higher."

### A. *The En Banc Itself*

En banc courts are necessary to resolve intracircuit conflict, to create new precedent, and to replace rules thought outdated and from which the court should depart. In 1977, judges had suggested that the increase in the number of judges would mean the need for more en bancs but that en bancs would be less effective. The time necessary to bring all judges together would also be greater and would serve to disrupt panels' regular sittings and judges' other work. Indeed, even before the 1978 statute<sup>76</sup> was passed, unhappiness with the en banc had led to some discussion about adopting a "short" en banc.<sup>77</sup> Once new judgeships were added, logistical problems in bringing the court's 23 judges together undoubtedly led to the August 1980 adoption of the eleven-judge "short" en banc procedure.<sup>78</sup> The number of en bancs held in the Ninth Circuit then increased,<sup>79</sup> and judges' comments suggest little hesitancy in calling for an en banc court, although not all such calls result in a vote to hold one. In 1984, "all but one of the judges agreed that [the new procedure] has proved to be a satisfactory

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76. Pub. L. No. 95-486 § 6, 92 Stat. 1633 (1978).

77. See Wasby, *Inconsistency in the United States Courts of Appeal*, *supra* note 4, at 1364-66.

78. 9th Cir. R. 25.

79. Cecil reports that in the first four years of the limited en banc arrangement, "the court voted to hear 37 cases en banc and has disposed of cases in approximately half the time required under the previous procedure." CECIL, *supra* note 21, at 8. The court reported 30 calls for en banc consideration in calendar 1984, with 11 accepted. 1985 ANNUAL REPORT, *supra* note 48, at 14.



substitute for the full en banc panel.”<sup>80</sup> The limited en banc is thought “institutionally sufficient to satisfy all members of the court” even when, as is not infrequently the case, the en banc vote is 7-4 or 6-5. The court has never had the full 28-judge en banc the rules allow, and requests for one have been extremely rare.

Just as with a case before a three-judge panel, there are several identifiable stages to an en banc proceeding after an affirmative vote on an en banc call and the ten judges are selected by lot to join the chief judge. Roughly a half-dozen judges said the en banc process was “the same as with a panel” or “not any different from a three-judge panel.” However, there were more people, which meant “you just transmit more copies,” even with communication restricted to within the en banc panel.<sup>81</sup> Judges who have experienced both the older, full-court en banc and the present limited en banc feel the move to the latter has had no effect on communication, perhaps because the present limited en banc is roughly the same size (11) as the earlier full en banc when the court had 13 judges.

Prior to oral argument, there is “very little communication” or “no communication” except for “administrative matters,” which include when the case will be heard and whether there will be additional briefs, and perhaps something on the framing of the issues, with even less on substance than would be true of a three-judge panel. The pre-argument communication occurs by memorandum (“No one has tried to set up an eleven-judge phone call”). The chief judge is the source of most of this communication, with some judges deferring to him, in part because “he’s very sensitive to when he has to check with the court.”

Little communication is necessary in this period because the judges “have already gone through the pros and cons in the course of deciding whether or not to go en banc.” That exchange, captured in judges’ files, eliminates the need for a bench memo. The presence of “so much prior exchange” also leads to suspending the norm of going into a case with as few preconceptions as possible, because unless a judge has stayed on the sidelines during the exchanges prior to the vote to hold

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80. CECIL, *supra* note 21, at 8-9.

81. See *infra* text accompanying notes 82-84.

an en banc, it is "unreasonable that you will not know what your colleagues think" and that they will not know your views.

Post-argument conference in an en banc case is much longer than the time a three-judge panel spends on any one case; it lasts two or three hours or more. Discussion proceeds in reverse seniority, voting starts with the most senior judge, and the senior judge in the majority assigns the writing of an opinion. (Unlike the U.S. Supreme Court's practice, the senior dissenting judge assigns the writing of a dissent.) The conference is "fairly well structured," as it must be with eleven participants, so it will not get out of hand. However, there is "more give-and-take" than in a three-judge case and it is "much more intense and focused." Conference "dynamics are quite different" from those of a three-judge panel because there are "more views, more nuances, more differences in arriving at consensus," with the case "looked at in greater detail" even if pre-en banc exchanges had narrowed the issues. Most judges felt that conference discussion was adequate ("As long as you had meaningful debate, you had sufficient time"), but some noted that with multiple issues, no one issue got necessary attention. Whereas in three-judge panels a dissent may not be registered at first but "may surface later," disagreements in the eleven-judge en banc "are more clear-cut" although "shifts may occur as you see multiple opinions."

Although a judge "who feels that he or she wants to emphasize a point" from conference may send a memo to the en banc judges, and there may be a memo from the "writing judge" containing an understanding "of items to be covered and how they will be covered," there is usually a post-conference lull in communication until a draft opinion is circulated. Then it is "fair game for everyone" and "the paper starts to fly again" in another "vigorous exchange." Majority judges apparently do not wait to develop a "finished product" among themselves before circulating an opinion. There is "far more response to the majority opinion in a close case"—from those who agree, who agree but would modify (and strengthen) the opinion, and from the dissenters. There is "another flurry" of activity when the dissenting opinion arrives. The post-conference exchange of draft opinions and memorandum responses at times leads to the realization that more discussion is necessary and to the suggestion that there be a second conference of the en banc panel. Despite resistance to such second meetings,

particularly if "not timely or well-organized," they do take place, because "some judges may feel the need for more face-to-face communication," and the meetings are thought to be "very useful" because they occur "after there has already been an exchange of memos and of views."

All communications are supposed to go to all members of the en banc panel, because the court decided that it "should avoid factions within the en banc," even where this made the process "clumsier." "All feel an obligation to speak openly and simultaneously to everyone." "Private lobbying" is discouraged both because of the general norm against lobbying and because it "might harden positions." Sessions of less than the full panel are viewed negatively because "all the members of the en banc should be present"; thus, a session of a number of judges when they were together attending a conference was thought improper. However, judges did allow some exceptions to the full-exchange rule; for example, several dissenting judges might communicate among themselves before circulating an opinion to the full panel.

Communication about the en banc case is confined within the en banc panel. After the en banc opinion has been filed, other members of the court can communicate about it. There is, however, no communication between the en banc panel and other members of the court before the en banc panel issues its opinions beyond an occasional question to the en banc about *when* its ruling will "come down," important for panels holding cases until that disposition. A judge not drawn for an en banc panel feels "as if the cases weren't in court, as if it were in the Eighth Circuit." "They don't tell me and I don't ask," even if a judge's own panel opinion were before the en banc.

One reason for this situation is that only the en banc judges receive briefs and other papers concerning the case. Thus other judges can't communicate "because we don't know what they're doing." Judges are also "so busy they can't worry about work that has been assigned to others." Dealing with 50-60 cases at a time—the 25-30 cases from the calendar just ended and the 25-30 cases for the upcoming calendar—leaves little time for additional communication. However, reasons other than the practical were also involved. There were strong beliefs that communicating with an en banc panel was not proper: "The understanding is that it is like communication [by one panel] with another panel: it is not to be done." Said

one judge, "If we are to have a short en banc, it must be sealed off or we don't have what we purport to have."

The "Chinese wall" between the en banc panel and other members of the court did, however, have some cracks. In 1984, two judges had said that "in some cases it has been difficult to restrict the deliberations to the members selected for the panels."<sup>82</sup> In 1986, a judge "sensed that more than eleven were involved" because he had "heard it from so many sources," and judges told of particular instances of such contact, although they often expressed (subsequent) discomfort over it. Some judges appeared not to object to communication with judges outside the en banc panel or thought it "perfectly proper" for others to bring a case to the en banc panel's attention because en banc judges "need all the input [they] can get," although all members of the court should probably be notified. The judge writing for the en banc majority might call the author of the panel opinion in this case "about where certain facts are in the record." And a judge not on an en banc panel who had "strong views" might "try to monitor" the panel's discussion and to provide "some informal input."

Communication between en banc members and other judges raises the question of the role, if any, that en banc judges play in relation to other court members and particularly whether they "represent" their absent colleagues. Some judges interviewed in 1984 reported that en banc panel judges "appear to feel an obligation to ensure that the views of all members of the court are represented in the deliberations."<sup>83</sup> Thus, as a judge remarked in 1986, while it was "obvious" that "there are some issues in which a majority of judges are not consulted," the situation doesn't leave a judge "feeling left out": "My views are represented, so I'm taken care of."

If, as appears to be the case, drawing en banc panels by lot produces a relatively random selection of the court's members, then en banc panel members, simply by voicing their own positions, will represent the full range, or something close to the full range, of views on the court. Thus, "viewpoints held by members not selected for the en banc panel are often addressed in the majority or accompanying opinions"<sup>84</sup> because the communication leading to the decision to have an en banc

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82. CECIL, *supra* note 21, at 44.

83. *Id.*

84. *Id.*

both makes judges aware of each others' positions and shapes issues for the en banc and the way judges approach the case. En banc members do not necessarily intend to present their absent colleagues' views, but some of that may occur nonetheless. When the court had a full en banc with all participating, "you represented yourself," but in being drawn for the short en banc, "you represent the entire court." That some judges feel they are "in a representative capacity" serves to "open the door to more effective exchanges," to "more full discussion, more give-and-take."

### B. *Inconsistency and Communication*

The basic reason that en banc consideration is proposed is the presence of alleged conflicts. The court goes en banc primarily to resolve inconsistent decisions or to chart a clear course to reduce inconsistencies. Efforts to deal with inconsistency also account for much communication among judges and the absence or inadequacy of communication may increase inconsistency. Although almost all the judges still believe inconsistency exists,<sup>85</sup> intracircuit inconsistency in the Ninth Circuit is not the hot topic of ten years ago, when the court had been criticized in the hearings of the Committee on Revision of the Federal Court Appellate System (the Hruska Commission) for having panels that did not pay attention to each other's opinions. Judges' occasional comments indicate they were far less exercised about inconsistency in 1986. Some judges viewed inconsistency as their legitimate efforts to distinguish cases. Other judges observed that "there is less of a feeling of disarray than a time ago"; that things will "straighten themselves out after a while if we will be a bit patient"; and that "it's like mosquitos at a picnic, a bother creating some extra work but not bad law." Some judges even put inconsistency in a good light, as in the comment, "The law changes by a gradual process of slowly shifting emphasis," with changes creating an appearance of inconsistency. On the other hand, one judge did call inconsistency "moderately serious, causing a lot of tension between panels trying to iron out differences," and one of the court's staff said that until an en

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85. Thirteen of 15 circuit judges did so in 1977, and of 25 all but one "unsure" judge did so in 1986. However, the portion considering inconsistency a "problem" has shifted, from 11 of 14 in 1977, although none then considered it extremely serious, to only 3 of 13 judges in 1986. For 1977, see Wasby, *Inconsistency in the United States Courts of Appeals*, *supra* note 4, at 1346-51, 1353-54.

banc took place there was the "embarrassing situation of conflicting opinions."

As in 1977, there is consensus that inconsistency occurs more frequently in some areas of the law than in others.<sup>86</sup> In the mid-1980s, immigration—a "high volume, fact-specific, volatile subject" with cases coming rapidly through the system—was clearly the predominant area of intracircuit inconsistency in the Ninth Circuit. In this area imprecision in the standard of review and in statutory terms is quite likely to provide greater play for judges' values, and matters of "activism" or "judicial restraint," part of the judicial role, were thought quite likely to lead to different outcomes. Among other areas the judges mentioned were Social Security, particularly disability; employment discrimination; civil rights action under section 1983; and labor law. Particularly noted were aspects of defendants' rights, including habeas corpus procedure and search and seizure. These topics were, however, not predominant, as they had been in 1977, when search and seizure, and particularly the "probable cause" or "founded suspicion" to make border searches, was most frequently mentioned.<sup>87</sup> Selective Service cases, which engulfed the Ninth Circuit during the Vietnam conflict, have now disappeared.

Inconsistencies were thought particularly likely to occur when the court was "groping for new law" or when the Supreme Court had not provided definitive pronouncements. As one judge commented, when the "Supremes" are in a period "where the rudder is loose, they veer from side to side, and can't beat a consistent course." On the other hand, inconsistency would diminish where the Supreme Court had "taken a firm hand" or had begun to resolve problems, as with municipal liability in section 1983 actions or the burden of proof necessary for disposition of employment discrimination cases on summary judgment.

Key among communication-related causes of inconsistency are the number of judges and the court's caseload. "In a 30-judge court working in three-judge panels, there is bound to be more slippage than in a 13-judge court." Particularly when new judges bring "differences in views and values," judges' decreased familiarity with each other in a large court means each will be less able to anticipate others' views. If members

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86. *See id.* at 1351.

87. *Id.* at 1351-53.

of a three-judge panel learn each other's views while sitting together for a week, the court's size means that the trio is not likely to sit together again for quite some time.<sup>88</sup> The court's "tremendous volume" is cited as a cause of inconsistency more often than the number of judges, and was noted by Chief Judge Browning in a published interview seven years ago.<sup>89</sup>

Inconsistency's basic cause, it seems, is also related to communication: judges do not intentionally write opinions at variance with circuit precedent but they do lack knowledge of other panels' actions.<sup>90</sup> This problem is, of course, not unique to the Ninth Circuit nor even to the United States. For example, courts in India, which use benches or divisions like U.S. Courts of Appeals panels, have "constant turnover of personnel who decide similar cases, sometimes unaware that a similar issue has been decided differently elsewhere."<sup>91</sup> In the Ninth Circuit, the "blizzard of paper"—the many slip opinions decided by the panels—makes it "much more difficult" for the judges to monitor developments in the law. You "don't read the slip opinions anymore," said a judge, because "it's absolutely impossible to keep up with them and stay awake." Some lack of knowledge is short-term: in "a number of situations" two panels had similar cases and "filed within days of each other," with the second panel not knowing the first had acted. At other times, "we may not realize a case is out there in conflict because we are not thinking about it in those terms."

In addition to agreeing that inconsistency exists and has a number of causes, judges also agree that there are mechanisms, although not adequate ones, to reduce it. In 1977, two-thirds of the Ninth Circuit's judges thought there were mechanisms

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88. An observer has commented that the reduced likelihood of a judge having the same issue again may incline a judge to indulge in dicta, which makes for a less coherent law of the circuit. Were there fewer judges, with each seeing the same problem again soon, each might wait and think the matter out more thoroughly before putting statements on the record.

89. An Interview with Chief Judge Browning of the Ninth Circuit, 13 THIRD BRANCH 1, 4 (No. 5, 1981).

90. However, some judges imply purposive activity: some colleagues are said to "have a certain amount of willfulness," with precedent "not seen as equally binding and persuasive by all."

91. See M. GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 496-97 (1984) [hereinafter *COMPETING EQUALITIES*]. For an example of inconsistency, see *id.* at 492, n.67. See also Gadbois, *Affirmative Action in India: The Judiciary and Social Change*, 8 LAW & POLY 329, 355-56 (1986), (discussion of Indian appellate courts' use of one-, two-, and three-judge divisions and the problems resulting therefrom).

available to reduce or avoid inconsistency but provided mixed responses as to specifics.<sup>92</sup> Particularly noted were use of en banc sittings, staff attorney screening of opinions, circulation of opinions among the court's members, and greater use of LEXIS. In 1986, by contrast, all the judges thought there were inconsistency-reducing mechanisms available. Although only 4 of 17 thought the mechanisms were adequate to avoid inconsistency, relatively few suggestions for additional mechanisms were made, perhaps because of a natural limit to eliminating or reducing inconsistency.

Mechanisms noted in 1986 can be grouped into two basic categories—those used before, and those used after, a panel has decided a case, with use of the en banc court the “ultimate weapon” or “terrible last resort.” The en banc was like a post-audit and could “take care of most of what slips through the pre-audit,” but because it was “burdensome” to use, other methods (likened to “pre-audit”) were thought preferable. One judge wanted to avoid mistakes by panels, because “if three judges make a wrong turn, they take eleven judges down the street with them.” Despite “built-in resistance” to use of the en banc, the idea of having the court overrule its prior decisions without an en banc, by obtaining the agreement of the court's judges after circulating an opinion, has been rejected.<sup>93</sup>

Mechanisms to reduce inconsistency that operate prior to a panel's meeting depend on work by the court's staff attorneys. These mechanisms are inventorying of issues in cases, calendaring of cases with similar or identical issues before the same panel, and notifying panels that other panels have cases with the same or similar issues.<sup>94</sup> Once the principal issues in cases have been identified, issue-codes are used to create groupings of cases to be assigned to panels. Within limits, the court's calendaring rules permit moving cases forward to be placed with calendar-ready cases with the same issue “to avoid duplication of research efforts and to minimize the danger of inconsistent

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92. Wasby, *Inconsistency in the United States Courts of Appeals*, *supra* note 4, at 1363-72.

93. For use of this mechanism, *see* *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985).

94. Motions panel opinions proposed for publication are also checked against the inventory of cases before argument panels, so that argument panels and the court's motions panels will not conflict. REPORT TO CONGRESS, *supra* note 30, at 30. *See also* Neisser, *supra* note 49, at 100 (indicating the desire for consistency in motions practice itself).



results.”<sup>95</sup> When joint calendaring of cases is not possible, judges are informed that other panels are processing like cases. This is done to facilitate communication between panels even if they only “coordinate their deliberations”<sup>96</sup> and agree on the sequence of filing opinions. The notification mechanism is said to “work pretty well on the major issues in a case,” but some feel the system has not worked “as successfully as it should have worked” because staff attorney-identified issues were “either too broad or too narrow” or the grouping was “superficial.” If a panel decides a case on subsidiary issues and does not check back for the inventory on those issues, the inventory process will not help avoid inconsistency.

Some judges, finding critiques they received helpful to avoid “getting strands all crossed up,” have arranged circulation of proposed opinions, but the device is thought to be too time-consuming to use regularly. Among “post-audit” methods short of an en banc are having lawyers call attention to perceived inconsistencies through petitions for rehearing. Staff attorneys also monitored cases and had been directed by the court to call a panel’s attention to an opinion that seemed in conflict with Ninth Circuit law. However, some judges viewed this negatively because staff attorneys were “not aware of subtleties” or “lobbied for a certain approach.”

Even if not able to read all opinions issuing from the court’s panels, judges do read some of each others’ opinions.<sup>97</sup> Although this may not help very much because the opinions would not “sink in” unless a judge is working on a case on that subject, judges did welcome the “watch dog function” of col-

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95. Hellman, *supra* note 63, at 958. Even when issues are not identical, such case-clustering can be helpful to the judges by providing a broader perspective and creating what one called a “seminar” on a topic. For the staff attorneys to hold a set of cases on a single topic was, however, not acceptable because the decision as to the panel to which to send a whole bunch of cases on a topic like immigration is “too political” and the staff attorneys may not do so now unless specifically directed by the court’s Executive Committee. For a recitation of some of the calendaring guidelines, see Lateef, *Keeping Up with Justice: Automation and the New Activism*, 67 JUDICATURE 213, 221 (1983). See also Neisser, *supra* note 49, at 98.

96. Hellman, *supra* note 63, at 958.

97. In commenting on other judges’ opinions, judges rely on their law clerks’ research, facilitated by the availability of WESTLAW. This system has made less necessary the use of publisher-prepared headnotes, suggested in 1977 as a helpful device. These current databases mean that judges in a high-volume court do not need to become familiar with all of their colleagues’ opinions in an area of law as the opinions are issued. Instead, when they do have a case on a particular topic, they or their clerks can “call up” the appropriate list of cases and can be sure they have not missed relevant ones.

leagues reviewing and commenting on their slip opinions. Nor did they seem defensive about having errors and omissions pointed out to them or about receiving memos "encouraging lining up with existing authority." This was because once judges "went public" with opinions, they might be "more committed to the result and language" than if there had been only "in-house" circulation. Communication on these matters was characterized as "courteous"; where "some judges write more broadly than others," those judges "will write more narrowly when asked."<sup>98</sup> Such courtesy assisted in achieving consistency: "If we can keep up communication and collegiality, we will find solutions"; "if 18 judges didn't talk, it would be a mess."

#### VII. A NOTE ON DISTRICT JUDGES

Although the use of district judges as members of panels has decreased significantly in the Ninth Circuit, they still participate frequently. Ninth Circuit judges were almost evenly divided about whether their communication with district judges serving on panels with them was different from their communication with other circuit judges. Perhaps the most apt comparison was that "It is no different than with 90 percent of the judges on this court, but it is different from those on this court I know well." The principal difference is that district judges are not on the electronic mail system. At times, circuit judges use electronic mail to communicate with the district judges by sending CCI messages via circuit judges in the same city "and asking them to deliver" the messages, but the judges feel this burdens their colleagues. Thus, communication generally must be by telephone and by memorandum sent by mail. Because the district judges were "not plugged into the system," communication with them was slower. In addition, at times it is "very difficult to get a disposition out of certain district judges"; their busy trial calendars make it "difficult for them to devote time and attention to another court."

There may also be less communication with district judges as a result of a disinclination "to give them as heavy assignments as we assume." Extended communication is less necessary when "because of concern over their workload, we have divided the work, 45-45-10, giving them the simplest, noncon-

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98. The "gun in the closet" of the en banc was, however, revealed when this judge said, "If not, I will take them en banc."

troversial cases." Moreover, the "need for prolonged, substantial communication is not great" because most district judges sit for only one day and consider only five or six cases. In communicating with district judges, Ninth Circuit judges may also hold back comments. There is concern that district judges' opinions "not stray from the line of circuit precedent." However, circuit judges "don't say things in exactly the same way" to district judges and "probably feel a little less free to suggest many changes in a district judge's opinion, although [they will] do so where an important substantive issue is involved." The possibly "aberrant" rulings stem from a district judge being "a bit of an outsider" and not being familiar "with cases that we have developed" or not being "in the flow" of communication among judges on en banc matters.

A district judge's presence "disrupts the flow of communication" in the appellate court in other ways. "Bringing in other people changes the balance that's already there" because there is "another personality with whom one has to deal." This is particularly true when substituting a district judge for a circuit judge might delay circuit judges sitting together for as much as two years and "we need to sit with each other as much as possible." If a district judge sits on an important case and that case goes en banc, "we have lost the input of one-third of the panel when we need all the input we can get."

In making such comments, some Ninth Circuit judges make an exception for certain senior district judges who "do nothing but sit with us" so that they are de facto members of the Ninth Circuit and "it feels like sitting with any other member." Most Ninth Circuit judges (16 of 20 responding to the question) say there is no difference between the participation of active-duty district judges and that of senior district judges in the court's work, with the individual judge making more difference than the judge's status. Some "are better than others, but not on an active versus senior basis," with "different categories in each type." Some seniors "work actively, some do nothing" and "some are in between"; although seniors "usually have more time," they may "have less energy" and some "come to see their grandchildren so they don't pay attention." However, Ninth Circuit judges feel district judges' relative trial court workloads do make a difference. Thus "a full-time active district judge has such a heavy load that that judge will have difficulty being prepared and getting the work done." On the

other hand, a senior judge, who can control trial court workload better and who has "half a load will have more time for study and opinion-writing"; such a judge "enjoys coming to sit and is not in a big hurry to get back to the district court."

Ninth Circuit judges did believe there were advantages in having district judges sit on Ninth Circuit cases. Having district judges and circuit judges sit together on cases provided "cross-fertilization" or "reciprocal exchange of information" in which district judges are given a perspective on the circuit court and circuit judges learn district judges' perspectives on cases. Learning does occur from district judge to circuit judge. Ninth Circuit judges can learn the district judge's outlook or "unique savvy" from their own colleagues who are former district judges and from presentations about those problems at court meetings. Yet this is not thought to be as effective as direct exposure to district judges; a former district judge noted that present district judges can remind the court of "some things we lost sight of after a while." District judges "have experiences they can communicate to the panel—things not immediately evident from the record." They "can enlighten us about practical problems not seen in the briefs" and can remind circuit judges that their decisions, "not the be-all and end-all," are "made under pressure, on the firing line." They can also indicate what appellate judges can do to make district judges' and thus the circuit's, work more effective. For example, they can point out that a "not inconsistent with this decision" ending to an opinion "is not helpful" on remand. Such learning is particularly important for appellate judges who have not been district judges.

It is more important for the circuit judges that district judges, "somewhere in the beginning of their career, understand the appellate process," and in particular, learn "the importance of the record" and "what needs to be in the record for review." In addition to "getting a feel for the process," they also learn that "we don't have disposable time" and thus get disabused of their idea that "we have more time at our disposal than we do." District judges also come to realize that the appellate court is not out to get them, that "in fair review of decisions," "we are not singling out district judges for particular attention."

Ninth Circuit judges said that when district judges "find out we aren't really different [and that] we're facing the same

problems," it assists in making them feel part of "one big, large circuit—vertically integrated from this court down to magistrates." The communication between district and appellate judges provides "a more cohesive court system" that is "tied together" instead of being "fractured." The "closer feeling of collegiality" produces the "benefit of having [district judges] as part of one system instead of one system overseeing another." Thus, the concern about collegiality extends beyond the appeals court itself, where it is a major concern, to the larger circuit, and is accompanied by practical benefits. If district judges' contact with the appeals court erodes the "us-versus-them" mentality, they may be more likely to implement Ninth Circuit law. "If a district judge enjoys the experience of sitting here, we make a friend of a potential critic; it may make the district judge more receptive to suggestions, more willing to accept than fight." The importance of this is made clear in the comment, "Because of the diplomatic problems inherent in the structural relations between the district court and the circuit court, we don't want to antagonize them and have things happen like mandates being evaded."

### VIII. LAW CLERKS AND STAFF ATTORNEYS

#### A. *Communication Through Law Clerks*

Most judges communicate with other judges through their law clerks some of the time; only a half-dozen said they did not. Law clerks also communicate with other clerks on their own. This occurs to a far greater extent than is realized by the judges, some of whom say it does not occur and who, their stated rules notwithstanding, are precluded by their own schedules and preoccupations from closely monitoring such communication.<sup>99</sup> The line between judge-to-judge and clerk-to-clerk communication is not hard and fast. For example, communication by memorandum from one judge to another "is often ghost-written by a clerk and responded to similarly," so that what appears to be judge-to-judge is basically clerk-to-clerk. Some clerk-to-clerk communication, for example, to allocate bench memos or to inquire about a procedural aspect of a case or its status, takes place within parameters established by judges and can be said to substitute for judge-to-judge

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99. One judge, noting that he instructs his clerks, who can talk to other judges, to indicate to the other judge to call him, said directly that "the rules aren't followed."

communication. When clerks communicate on specific case-related matters at the judge's request, for example, when judges use their clerks to "send out a trial balloon" about an opinion to other chambers, the communication is really judge to clerk to clerk to judge.

Some wish judge-to-clerk and clerk-to-judge communication to be avoided ("I have a rule: judges talk to judges, law clerks to law clerks, and I enforce it as rigorously as I can."). The dominant view is that clerks "should have no reason to initiate a call to another judge." However, judges may also talk with clerks from other offices; a clerk calling another clerk may end up talking to the judge or a judge calling a temporarily absent colleague may discuss a matter with the clerk working on the case. "Law clerks and the judges are like a law firm," with communication within chambers facilitating communication between chambers. Thus communication by either judge or clerk may not be unlike communication by another. Indeed, a few judges seem to allow clerk contact with other judges located in the same building. Clerks for a judge who is the only judge or one of only two in a city have little opportunity for contact with other judges' clerks unless their judges take them to argument sessions. On the other hand, clerks in cities where argument is held have the opportunity to meet some clerks of all the judges coming there as well as the chance for more exchange with those in the same building.

Communication among Ninth Circuit law clerks in 1986 was not as extensive as it appeared to have been in 1977.<sup>100</sup> When the court had fewer judges, clerks for any one judge had the opportunity for greater contact with any other particular judge's clerks on a regular basis. Having the face-to-face contact that facilitates later telephone communication, they did follow up personal meetings with telephone contact. In earlier years, clerks were able to overcome the barrier of judges' geographic dispersion in a way they cannot with the larger number of judges. The court's overall attitude toward clerk-to-clerk communication also has changed, with judges giving greater recognition to colleagues' dislike of its use and to problems it produces. Judges routinely referred to several judges—all seemed to know who they were—who wanted "all communication through the judge," characterized as "an anti-

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100. Wasby, *Communication Within the Ninth Circuit*, *supra* note 1, at 11-14.

*Brethren* stance.”<sup>101</sup> Sensitivity was also evident in comments about judges’ rules against one clerk calling another clerk and in the remark, “If there is any reticence on the part of the other office, I don’t use” such communication. Judges vary in their restrictions on law clerk communications, with some “expecting them to use their discretion about whom to call and about what” and saying “rules trying to regulate how to deal with each other are counterproductive.” However, the consensus is generally clear that substantive decisions, matters on the merits, should not be handled by judges’ indirect communication through their clerks. Although clerks could discuss decided cases, judges don’t “like clerks to call other clerks about pending cases.”

The judges’ feelings are clearest about lobbying: there should be *no* lobbying by the clerks for a point of view. Apart from the tradition against judges’ lobbying, judges felt that, however they dealt with each other, clerks’ lobbying was independently verboten. “We all lecture our clerks against that.” For some, this extended to not having clerks inquire of another judge’s clerk about the latter judge’s position, which is “none of their business; those clerks can ask their own judges.” Although some judges “wouldn’t object to the clerk responding to an inquiry,” the operative rule apparently was that “clerks shouldn’t volunteer” a judge’s views.

The rules do not exist solely as a matter of tradition or prerogative; they exist for a reason. Judges may wish to avoid dealing with clerks because doing so removes a preferred opportunity for dealing with other judges; this may be more important than any objection to dealing with law clerks. There is also an efficiency concern. Because there may be too much “chewing the fat, diverting attention from work,” clerk-to-clerk communication “can waste an incredible amount of time.” Another objection is that communication from judge to judge through clerks “presents problems that eye-to-eye communication between judges doesn’t.” There are inherent problems of dealing with any intermediary; for example, “accuracy, perception, and nuance” are lost, something exacerbated by law clerks’ lack of training and experience or their lack of maturity (they are “cocky, fresh from law school”).

This focus on misrepresentation is some judges’ concern,

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101. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

although far from all judges share it. Because "clerks want to talk as well as listen and sometimes give what they think is the judge's view and it's not quite the view," judges have "to be skeptical in hearing from a law clerk what a judge thinks." A more serious matter is that judges don't want clerks to presume or assume the authority to say "Judge X feels" or "Judge X says." If the clerks do so presume, they "may feel they have more power and authority than they have; the judges have judicial authority and the clerks ought not to feel they can act as agent for the judge." This would be particularly serious if it took the form of clerks "working a deal" on cases they were interested in. There is also the risk that "disputes get exacerbated down the line" and are "more serious at the clerks' level than at the judges' level," that is, the clerks make more of a matter than do the judges.

The great majority of judges who do occasionally communicate with colleagues through law clerks find such indirect communication helpful. For one thing, it is efficient. A "lot of time was saved by informal communication, instead of having judges write memos to each other," when it is "not necessary to bother the judge." Telephone communication between clerks may be a "more collegial way of taking care of minor problems," a "gracious, civil way of calling attention to a matter such as 'Did you really mean that?' in an opinion without casting the question in a memo, which can be cold." It is also an "inoffensive way to find out what's troubling the judge," a "way of avoiding confrontation" when one is "getting impatient about the status of a case or curious when something hasn't come." One judge was unusual in wishing to have more communication through the law clerks. He felt that clerks could serve as "mediators" in working out language in opinions. When there is a "hassle" with other judges, "law clerks can get right down to specifics," whereas "judges, because of their long-term relationship, have to deal with each other at arm's length."

### *B. Staff Attorneys: Motions*

In 1977, only half the circuit judges communicated with other judges through the court's staff attorneys. This was perhaps a function of the newness of the staff attorney program, and the judges thought such communication would increase as



staff attorneys came to write more bench memos.<sup>102</sup> Increased communication through staff attorneys appears not to have occurred. However, staff attorneys do write bench memoranda for screening cases, particularly "in all of the less complicated cases" but also, at judges' request, in more complex ones,<sup>103</sup> and at times serve on loan to individual judges as elbow clerks.

Although there is much less communication between judges through staff attorneys than through law clerks, the motions attorneys (one group of the staff attorneys) have become an important communications link between the judges. In 1986, only four of the court's judges, including two who were relatively new to the court, said they did not communicate with their colleagues through the staff attorneys. Such communication came almost exclusively when judges sat on motions panels, which handle motions in cases until the cases are placed on calendars. Judges are assigned to such panels every five months for three weeks, with the lead judge rotating each week.<sup>104</sup> The motions have to be disposed of rapidly, within the week they are received and within 24 hours for emergency motions, including some stays. Because the papers are likely to be in the hands of the motions attorneys on the court's central staff rather than in the hands of the motions panel judges, communication on motions regularly involves those attorneys. Indeed, they "serve as the contact point among the judges" in what is perhaps the "only time you rely on anyone else to communicate with other members of the court." A judge might "occasionally communicate with a staff attorney about a particular issue involved in a screening case," but it "would be very rare that he would ask the staff attorney to communicate with other members of the screening panel."

The motions attorney will call a judge, who will provide an opinion that the staff attorney will then communicate to the other motions panel judges. This occurs because of the "fast pace" with which the motions panel must work, particularly on emergency motions "where the emergency precludes written communication and requires working through one person";

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102. Wasby, *Communication Within the Ninth Circuit*, *supra* note 1, at 14.

103. Neisser, *supra* note 49, at 100.

104. The lead judge of a panel for civil motions also decides some single-judge motions; such motions in criminal cases are decided by the criminal motions judge for the administrative unit. "A single Judge in each administrative unit considers all one-Judge criminal motions to ensure consistency and continuity in monitoring and expediting criminal appeals." ORIENTATION HANDBOOK, *supra* note 74, at 100.

matters "move more quickly . . . through intermediation." However, judges will communicate with each other directly where matters are controversial: the judge may ask the motions attorney to have another judge call, or the staff attorney may get on the phone with both judges. In short, when matters are routine, the staff attorneys communicate with other judges; "if it's controversial it is judge-to-judge."

Communication in connection with motions work is based on the telephone far more heavily than communication for either screening or argument calendar cases, although if judges on a motions panel were in the same city they might meet to discuss important issues.<sup>105</sup> Judges' comments on communication with staff attorneys related to motions work are studded with references to heavy phone use. While 98 percent of communication about argument calendar cases was in writing and two percent by phone, on motions "the opposite" was the case. Judges regularly turn to use the phone when speed is necessary, and motions work is perhaps the primary situation requiring speed. Because the third judge is involved only if the lead and second judges disagree on a disposition, telephonic communication on motions work does not necessarily involve three judges.<sup>106</sup> However, at times the phone is used for judge conferences, and telephone conferences in which attorneys for the moving parties are included have also been used. "Motions panels faced with emergencies have with increasing frequency arranged telephone conference calls,"<sup>107</sup> but "increasing frequency" does not mean large numbers: conference calls are not a major means of judge-to-judge communication even in this setting.

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105. To deal with a backlog that had developed in the handling of motions, the court developed a program in which judges came to San Francisco to dispose of the motions by meeting with staff. The staff makes oral presentations to the judges, who ask questions. This substituted for staff preparation of a full memorandum in even simple cases. In this program, screening takes place in which some cases then go to regular motions panels for full treatment. The court is considering altering its motions procedure by having the judges on a motions panel come to San Francisco for one day each week to dispose of some cases in face-to-face sessions with staff, with the remainder of the cases handled as before, based on papers transmitted by mail.

106. Some motions are decided by a single judge, *see supra* note 104, some by two judges, and some by three judges. If a motion is dispositive of a case, three judges must deal with it; otherwise two judges who agree will dispose of it. Certain unopposed procedural motions are decided by the clerk, a designated deputy clerk, or a motions attorney.

107. Neisser, *supra* note 49, at 101.

## IX. FACTORS AFFECTING COMMUNICATION

In this, the article's concluding section, we examine a set of factors identified at the beginning of the article as potentially having effects on communication among judges in the Ninth Circuit. Those factors are the number of judges on the court, its geographic size, and judges' location within the circuit. In addition, communication is affected, as it is in any social grouping, by norms of conduct. We discuss that first, then turn to matters of numbers, geographical dispersion, and judges' location.

## A. Norms

A judge "may not be willing to express his real perceptions of what norms regulate his behavior" in response to interview questions.<sup>108</sup> However, in the present study judges readily talked about "traditions" or "informal rules" which, like norms, while not always obeyed, are adhered to often and departures from which are avoided where possible. (Perhaps the judges were more willing to discuss the behaviors that constitute the daily operation of norms because they were not asked directly about the term "norms.") The type of norms discussed were "decisional norms," that is, "how a judge goes about making a decision," not "purposive norms"—those "regarding the purposes or goals of courts,"<sup>109</sup> about which judges might be more reticent.

Agreement certainly does not occur concerning all aspects of the court's operation. An obvious example is the absence of consensus as to the preferred screening panel procedure, with partisans of both the serial and parallel systems adducing substantial reasons to support their preferences. Yet the extent of Ninth Circuit judges' agreement on the values to be served by the court's actions and on certain ways of doing things is quite striking. Some norms, for example, that one will respond to other panel members' opinions before writing more of one's own, have been formalized. Although in talking about "rules" judges tend to overestimate the extent to which some norms have become formalized, the norms exist and affect behavior even when not formalized.<sup>110</sup> The judges learn about the norms when they join the court, when colleagues, perhaps the "big

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108. SHELDON, *supra* note 5, at 80.

109. *Id.* at 89.

110. At the U.S. Supreme Court, the Justices also believe there are unwritten

brother" or "big sister" assigned to help them get oriented, tell them about its operation. They also "learn by doing," perhaps most obviously when they violate a norm: "You aren't as free to do certain things as one first thought; you learn as you go along, and other judges cut you down if you're too expansive."

Two of the most evident norms, or points of agreement, are that if possible a judge should not interrupt another's work and that a member of a three-judge panel should communicate the same message to both other panel members. As one judge observed, it is "fairly strongly held by some judges that two members of a three-judge panel shouldn't hash over a case and resolve it" and that "side conversations [are] not appropriate." We "don't discuss a case between two members of a panel and then let the third know." This norm leads judges to decreased use of the telephone and increased use of the electronic mail system because a telephone call interrupts another judge's work and a judge would have to make two calls to transmit a message. By contrast, electronic mail carries the same message to both other members of the panel, who can turn to the message at their convenience. These and other practical reasons support decreased use of the telephone, but they do not diminish the actuality of the non-interruption norm even if it is not observed universally.

There is also a norm that there will be no communication between members of the en banc panel and other members of the court, at least until the panel files its opinion(s). This norm is facilitated by distribution of case materials only to the eleven panel members and by their prior knowledge of colleagues' views. There is also definite consensus about clerks' lobbying, and the occurrence of such lobbying or the possibility of its occurrence provokes strong statements of dislike. Judges, although differing as to whether clerks may communicate with each other, will try to respect others' wishes that such communication be kept to a minimum. A related norm is that "lobbying" by judges, particularly of panel members by judges not on that panel, is inappropriate. However, the extent of consensus about this norm is unclear, "slippage" (nonadherence to the norm) is recognized, and judges who view lobbying negatively do not condemn their colleagues for doing it.

Recognized exceptions to norms further illustrate their

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rules concerning certain behaviors even where there are now written ones. See Perry, *supra* note 2, at 12.

presence. For example, it is permissible for a judge to communicate with only one panel member if the third judge has clearly indicated a dissent and doesn't want to hear from the majority until those two judges "have their act together." In addition, not all slippage from a norm indicates the absence of consensus: judges' treatment of some deviations also indicates norms' hold. For example, despite the general view that memorandum dispositions should not be prepared in advance of argument even in relatively straightforward cases, some judges *do* come to argument with "memo dispos" in hand. However, they are reluctant to have it known that they do so and they show a lack of awareness that some colleagues also engage in the practice; both are indications that the norm operates to suppress recommendation and discussion of the practice. Other practices, accepted but thought to be minority positions in terms both of colleagues' views and practice, also are not discussed as often as might otherwise be the case, thus retarding their further adoption. Many differences in practice that do exist or even flourish, such as some panels' issuing opinions from the bench (not uncommon in some other circuits) or proposing that attorneys attempt to settle a case before it is considered "submitted," result from panels' considerable flexibility in operation. That flexibility is largely a function of presiding judges' views.

### B. Numbers

At least as the judges see it, the number of judges affects communication in the Ninth Circuit. In 1977, when there were 13 judgeships, 12 of 15 judges (including seniors) said that numbers had an effect;<sup>111</sup> three-fifths of the judges (19 of 29) gave the same answer in 1986. Just as a number of judges in 1977 had recognized the effect of the change from 9 judges to 13, of those in 1986 who had experienced the more recent increase in judgeships, 12 of 15 said the increase also affected communication.

One might have expected a higher proportion in 1986 to say numbers had had an effect, but most judges appointed after the 1978 Omnibus Judgeship Act—eight judges appointed in 1979 and another four in 1980—had not seen the effects of adding large numbers of judges in a short time; they had "never known the intimate court." Thus the more recent

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111. Wasby, *Communication Within the Ninth Circuit*, *supra* note 1, at 20.

change to 28 judgeships was said to have made "no difference": the chief judge held meetings, "new faces were added to the table, but the tenor of meetings didn't change." Some thought that once expanded from three judges to more than seven or eight, the court would be little affected by further expansion.

Another quite different and more fundamental explanation is that numbers don't affect communication because the court's judicial business is carried out by three-judge panels and the numbers have "no relations to panels." Communication thus occurs within "several galaxies of three" within the court's larger universe. Also, although numbers affect discussion leading to the en banc court, "there are only eleven" on the en banc itself. Still another perspective is provided by a judge who came from a large law firm to the court, which "was just a small bunch of folks": "When I started law practice, there were six people in the firm, then it went to over one hundred. It was part of a dynamic practice—I thought expansion was right and proper."

The effect of numbers is clearly recognized. A long-time member of the court, who conceded he had been "more optimistic than I should have been" in his 1977 claim that adding judges wouldn't change communications, said that because "the *amount* of communication is considerably greater, more time has to be devoted or you skimp or both. It is different." One recognized effect is that although there can be "geometric increases" in communication, particularly in the period after a panel files an opinion, there is "much less communication between individual judges than if it were a smaller court"; the large(r) numbers "dilute communication with any given judge" and communication is "spread thinner." With "a limited number of hours in the day, there is less time to communicate with each judge." Not only does communication become thinner, but it also may shift in substance. "Humorous memos, clippings, cartoons, and gaffes" that once were sent around are no longer sent, at least in the same volume. In addition, "one might make the case" that with "general communication" reduced, "one addresses colleagues more on jurisdictional matters" out of a desire to communicate, as one "searches for something to send them."

Keeping up with colleagues' opinions, a result of the caseload that leads to more judges, is also more difficult. Not only are there more memos about pending cases, but opinions

pile up faster. "The review of other judges' work is difficult on a large court": heavy caseload means that time has to be spent keeping up with work "instead of using it to read other judges' opinions." However, keeping up with others' slip opinions may not be as important as was once thought "unless you carry in your head a model in which all the judges know all the others' cases," something that would cause the Ninth Circuit to "grind to a halt." With the advent of LEXIS and WESTLAW, a judge "now has access to cases, more quickly, than one did." However, some judges saw advantages from following slip opinions. They spoke of obtaining "a sense of problems bothering the court" from the institutional flow and of the "type of perspective you can get from the volume of cases" in an area like immigration law and said that "if you keep up with slip opinions, you are educated by many bright people."

Under the court's rule that each judge should sit an equal number of times with each other judge but that panels should remain intact for a week's calendar, another effect of the large numbers is that "more judges don't sit with each other as frequently." Instead of sitting with each other every two to three months (when the court had eleven judges), as long as two years would elapse before one judge would sit with another. Interaction between three judges of a panel during "court week" is likely to include not only official business but social exchange at lunch, intensive exchange that provides a basis for more effective later communication. Their infrequent sitting together reduces judges' chances to communicate to "an occasional social visit if they are in the same town at the same time, or at court functions." Thus it is "less comfortable . . . to carry on communication," particularly personal communication. As an overall result, "you know less about how [other judges] respond to cases." "When you sit with someone new for a whole week, it can change that judge's outlook about you," leading that judge "to call and kick things around." Maintaining "close collegial relationships" in the court is also more difficult.

Despite the problems, several judges volunteered comments about the extent to which the court remains quite collegial. "As large as it is, it is a very close court." As another judge said, "There is a genuine feeling of warmth, affection, and respect." This remark was echoed in the comment that "communication is remarkably good considering the number of

judges and the complexity of cases, and the shift in ideological balance." Mention of "divergent philosophy" and "ideological balance" suggests a factor perhaps more important than numbers.<sup>112</sup> Judges suggested that their new colleagues of different ideological persuasions have been integrated into the court's communication. However, the "ideological split" within the court was said to be the "true factor affecting communication," with each "team" said to be "reluctant to talk to the other," and with "less communication across team lines than within."

Technology can serve to diminish possible effects of numbers on communication. Although there could be a problem of "listening"—of absorbing feedback from 27 judges—judges frequently commented that "it is no harder to talk to all of the judges than to one because of the technology of sending a memo simultaneously through the CCI." Communication by CCI, because "virtually instantaneous and unimpeded," reduces the effect of the circuit's size or any judge's location on communication, just as having a phone "with a bunch of buttons" means one "can talk easily" to anyone on the court. "On matters of merits and legal issues, questions of discretion and strategy, the CCI allows as fast communication as if you were in the same city." Problems come in dealing with someone, like a district judge not on the CCI system or circuit judges in Hawaii and Alaska, because of the time differences and the greater difficulty of getting through to them. Prior to the installation of the electronic mail system, the size of the circuit was becoming a real barrier to communication because it depended on paper coming from many places, with a large number of judges—particularly when that number exceeded 20. The ability of judges to *feel* they were communicating effectively was thought very important to the ability of the court to function. To prevent the body from falling apart, getting communication quickly and effectively was crucial.

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112. The effect of a new judge's perceived ideology requires more extended treatment than can be given here, but two comments are relevant. One is that someone "coming into the court may feel the need to vindicate the reason for appointment, but that passes quickly"; Ninth Circuit cases are said to have relatively little to do with "liberal," "conservative," or "libertarian" perspectives, so that even if a judge is appointed because of such ideologies, the labels are often frequently irrelevant. The other is that one can't always identify a judge's ideology by the appointing president: more than one observer has said that far from all of President Carter's appointees to the court are "liberal" and that "President Reagan wouldn't be displeased with some of Carter's appointees."



*C. Geography and Judges' Location*

The Ninth Circuit's size, "running from the Rocky Mountains to the Sea of Japan," might well be thought to affect communication. In 1977, a slight majority (9 of 15) thought it did, although the telephone was said to eliminate the effects of distance,<sup>113</sup> but in 1986, 26 judges responding were evenly divided on the matter. Some thought it "makes no difference to call someone in Los Angeles or Seattle, or to send a memo to San Diego or to Boise," and others questioned the importance of any effect. They also put the matter into context. Geography is a factor if one compared the Ninth Circuit with the D.C. Circuit "where all *can* communicate in their own building," but is "not terribly important when ranked against other factors," including "administering justice in a large area" and in maintaining the circuit intact so as to limit the number of circuits. Another judge argued, "Communication is affected more by the number of opinions, with so much coming out—that's what burdens cohesiveness, not physical separation."

Geography's principal negative result was that face-to-face contact was "more difficult"; this is a drawback because "something happens with physical contact that doesn't happen elsewhere." One judge thought, however, that only "the opportunity for casual conversation and gossip," not serious communication, was affected. A colleague stressed the need for such face-to-face contact "to take the sharp edges off communication," "less sarcastic and sharp" than when electronic mail was the vehicle.<sup>114</sup> Indeed, as a way of counterbalancing judges' dispersion, suggestions have been made for both greater use of conference calls and use of videoconferencing.<sup>115</sup>

One should not, however, overestimate the amount of face-to-face contact that might occur were the judges in the same place. The judge who had compared the Ninth and D.C. Circuits said the judges of the latter "are as isolated as if they were in Alaska." Another judge, who had served on a smaller

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113. Wasby, *Communication Within the Ninth Circuit*, *supra* note 1, at 17-18.

114. The view that even technology like electronic mail cannot substitute for face-to-face communication—certainly the traditional view of the matter—is found in the comment about the need for the chief judge of a federal appellate court and the circuit executive to be in the same city: "Even with the wonders of modern communication there is no substitute for direct and close association at the same location . . . . The separations inevitably lead to delay and misunderstandings." J. MACY, JR., *THE FIRST DECADE OF THE CIRCUIT COURT EXECUTIVE: AN EVALUATION* 44 (1985).

115. Neisser, *supra* note 49, at 101.

court, with all colleagues in the same city, added that they had "communicated primarily by memo." However, others thought that whether everyone is in the same place might be more of a factor than the circuit's geographic size: if people were in the same place, "you could run down the hall and ask questions" ("but you do that on the phone") and "could iron out things faster," in part because "office visiting brings about consensus—memos won't get it done." Judges would also "be more inclined to get a panel together again" if they were in the same place. Moreover, such an arrangement would allow "the subtlety of peer pressure" to work more effectively.

The judges were in general agreement—two-thirds (16 of 26) agreeing—that a judge's location affected communication because "you communicate more with people right around you." The principal element seemed to be whether only one judge or several judges served in a location. A "solo" judge, who "would communicate more and have more fulfilling communication if I had some of the other judges around me," tried to make up for that by going to lunch with judges when in their cities. Judges in the same courthouse with others, in addition to having casual elevator or parking area encounters with their colleagues, found it "much easier" to call and get together with another judge in the courthouse with their clerks present.<sup>116</sup> There was, however, not much actual visiting between judges in the same building. They "don't drop into each other's chambers," in part because differing schedules meant they were not all in the same place at the same time. Judges who worked in the same city might actually see each other more when they were away from that city and sitting together in another location; freed from their offices, they might visit more and have lunch.<sup>117</sup>

It was also the case that "each location experiences a different situation." In particular, San Francisco as circuit headquarters was different; it was what one judge called the difference between "being at the center rather than at the periphery," because of the "distinct advantage" of "knowing what the staff was doing," being able to "find out from the cir-

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116. One judge objected to having judges in more than one courthouse in the Los Angeles area for that reason: it "fragments the court."

117. That occurred during the interviews: two judges from the same city both commented on not having seen each other "at home" for two weeks, but that they had seen each other for two days in the city where they were both hearing argument.

cuit executive or the chief," or obtaining memos from them or from the clerk.

An issue ten years ago was whether all judges should be in the same place. Almost all then thought they should be able to remain located throughout the circuit.<sup>118</sup> The matter is no longer a live issue: "we can't do anything" about the situation; "it's a reality." Indeed, only one judge of 26 disapproved of judges living throughout the circuit. One result of allowing judges to have their chambers in the cities from which they were appointed is that it "permits many more people to consider becoming judges." (A long-term judge said he "wouldn't be on this court if he had to leave [his state]," something "true of many others on this court also.") For some, there was an issue, not present ten years earlier, of the effect on spouses' careers of requiring judges to move to San Francisco. "With two-career families, you can't demand someone pick up and move"; it would be "economically impossible." Moreover, "it's not just women judges who face that today. Wives of male judges have careers."

Some judges talked of "selfish" reasons for staying where they were. However, the judges also put a positive face on the matter. They stressed the value of "not everyone reading the same paper, not in the same climate of opinion." Having their colleagues be in touch with diverse places helped make the Ninth Circuit "a real circuit court," not one where "we live in Chicago or 30 miles from Chicago."<sup>119</sup> One thus has "the mix and blend of greatly varied personal and professional backgrounds important to the court's decision-making"; this "has a tendency to stabilize it and smooth out the sharp departures one might have." Others, however, said having the judges living in various areas and giving the bar an input had "no advantage" and was "more of P.R. than substance," something that "doesn't make a difference in the hometown." And even judges who supported the present situation recognized drawbacks in it. They noted "the tremendous costs with dispersion" affecting the court's day-to-day work, the "loss of efficiency by not being in the same city," and the "burden" of travel and the

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118. Wasby, *Communication Within the Ninth Circuit*, *supra* note 1, at 21-25.

119. For the Seventh Circuit's defense of its now discarded tradition of having all its judges in Chicago, see Swygert, *supra* note 15. As my colleague Thomas Church has observed, reasons judges offer for not moving are reasons anyone in any occupation would offer, with being able to live where you want having come to be regarded as a perk.

"isolation" of individual judges. However, they also noted that the judges' isolation might be exacerbated if "you drop people into San Francisco when others feel they can't approach you."

## X. CONCLUDING COMMENTS

Communication among judges of the U.S. Court of Appeals for the Ninth Circuit is substantial, notwithstanding their dispersion over a very large geographic area. The sizeable number of judges has affected the judges' knowledge of their colleagues, but, perhaps because of the court's size, the judges work hard at maintaining effective communication and preserving the court's collegiality. The availability of the telephone and more recently of electronic mail has served to lower some boundaries to communication. Electronic mail has also served to facilitate communication within three-judge panels and eleven-judge en bancs as well as among all 28 members of the court when they are considering whether to go en banc.

Patterns of communication do, however, vary with the type of case being considered and with the stages of a case. For example, screening panels deciding simple cases, particularly if using the serial mode of decision, communicate very little with each other and do so almost entirely in writing, while judges in parallel mode screening panels communicate more and use the telephone as well as memoranda. When argument panels consider cases, pre-argument communication is generally limited to administrative matters, with telephone use because of time constraints. After the post-argument conference, initial communication—the circulation of opinions—is almost entirely in writing, although once panels file opinions, not only does communication expand to larger numbers of judges, but both the telephone and electronic mail are used. Comparable patterns occur for en banc panels.

When district judges sit with the court, patterns of communication with them are basically the same, but there is less communication and it must be restricted to mail and telephone as they are not part of electronic mail system. Most, but far from all, communication is directly from judge to judge, but judges also use their law clerks for communication with other chambers and the clerks engage in such communication on their own. Staff attorneys and other central staff are not often used for judge-to-judge communication except in connection with motions work.

Although these patterns of communication may seem less than optimal, Ninth Circuit judges' satisfaction with communication with their colleagues seems high. All but 3 of 28 judges said they were satisfied, although 12 of 15 responding said more could be done to improve communication. Among the positive reactions were a reference to the court's "amazing candor" in its communication and the ability "to communicate swiftly, fully, and effectively." Several judges did, however, qualify their comments, for example, saying communication "was on a pretty good level, considering the size of area and numbers." A couple of judges also felt it important to point out that "the problem is not communication, but individual judges," with communication "far more a matter of personality and desire to communicate than of size." There was "far less communication in some marriages than between any two judges of this court," added one judge.

Apart from some problems with the electronic mail system, a number of judges did express concern about the "almost exclusive reliance on memoranda" and about insufficient face-to-face contact, either in connection with deciding cases or when the judges were together during court week. As to the former, a conference "to thrash out the final language in an opinion" and "more opportunity to discuss apart from cases" was suggested. As to the latter, some judges noted there could perhaps be more socializing but recognized their colleagues might be in their hotel rooms preparing for the next day's argument. The importance of such face-to-face contact was shown in several comments. One was that "the more you get to know the members of the court, the easier your communication with them." Another was the observation, by a judge calling himself a "fatalist," that keeping the Ninth Circuit intact meant the "cost" that had to be paid of having more judges and thus "less interaction among the judges." Still another reaction was apparent in the very negative view that a judge would "have to quit" if the court came to use videoconferencing because the loss of the "human contact" from argument would be severe. As it was, he felt the "space capsule syndrome"; "to walk down the hall to talk to my TV set would add to it."

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The need for effective communication within a multi-judge court, particularly one of this size, is clear. Not only is it essential if the court is to maintain its collegiality across ideological

lines and geographic distance, but effective communication is imperative if the court's decisional output is not to become inconsistent. The extent of the judges' knowledge of cases colleagues are considering, knowledge gained from each other and from staff, underlies the degree of intracircuit inconsistency. It is clear that the Ninth Circuit's judges have managed to maintain the extent and type of communication they consider generally satisfactory, particularly in the environment in which they operate. It is also quite clear that they have developed norms for facilitating communication that will assist effective decision-making and that they work hard at maintaining the collegiality they consider so important.